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To tax or not to tax, that is the question

I. Introduction

This paper (i) summarizes and (ii) analyzes the opinion of the US Supreme Court dated 14 June 2007 on a dispute between the Permanent Mission of India to the United Nations and others and the City of New York. The analysis focuses on the applicability and interpretation of the relevant instruments of international law. Because the only question before the Court was one of jurisdiction and decision on the merits will presumably follow later, this analysis is divided into two major parts. Immunity from jurisdiction shall be discussed first, while exemption from taxation will be treated separately.

1. Background

For years New York City (respondent) has levied property taxes against petitioner foreign governments for that portion of their diplomatic office buildings used to house lower level employees and their families. Respondents refused to pay the taxes.

By operation of state law, the unpaid taxes converted into tax liens held by the respondent against the properties. Respondent filed a state-court suit seeking declaratory judgments to establish the liens' validity.

Petitioners removed the cases to federal court where they argued that they enjoy immunity from jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA).

The District Court disagreed relying on a FSIA exception withdrawing the foreign state's immunity from jurisdiction, where *"rights in immovable property situated in the United States are in issue."§ 1605 (a) (4).*

2. Opinion

In determining the scope of the immovable property exception, the US Supreme Court, by its opinion on 14 June 2007, found that it does not expressly limit itself to cases in which the

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specific right at issue is title, ownership, possession, or specifically exclude cases in which a lien's validity is at issue. Rather it focuses more broadly on rights in property.

Furthermore the Court found that *"Congress intended the FSIA to adopt the restrictive theory of sovereign immunity, which recognizes immunity with regard to sovereign or public acts (iure imperii) of a state, but not…private acts (iure gestionis)".*

By its order the Court affirmed the judgment of the Court of Appeals and remanded the case for further proceedings. That means that the District Court shall have jurisdiction to hear and consider the case as regards the validity of tax liens on the property of foreign States.

In the opinion of the Court the Vienna Convention on Diplomatic Relations (1961), on which both parties tried to rely, does not unambiguously support either party, and, in any event, does nothing to deter the Court from its interpretation.

II. Analysis

1. Immunity from jurisdiction

In the present case petitioners argued that they were immune from the suits under the FSIA's general rule of immunity for foreign governments. § 1604. The District Court disagreed relying on the FSIA's "immovable property exception", which provides that a foreign state shall not be immune from jurisdiction in any case in which *"rights in immovable property situated in the United States are in issue."* § 1605 (a) (4).

In the Vienna Convention on Diplomatic Relations 1961 (hereinafter referred to as the VCDR) we can hardly find any provision on the jurisdictional immunity of a mission. It should be noted that inviolability of mission premises includes immunity from execution but excludes immunity from jurisdiction. Paragraph five of the commentary to draft article 20 (later article 22) of the VCDR makes it clear that however *"no writ may be served within the premises of the mission, and that no summons to appear before the court may be served in the premises by a process server…There is nothing to prevent service through the post if it can be effected that way."* It is therefore understood that, by virtue of paragraph 3 of article 22 of the VCDR, inviolability of mission premises includes immunity from execution. While jurisdictional immunities can include both types of immunities, namely, "immunity from jurisdiction" and "immunity from execution", the former is essentially different in kind as well as in stage from the latter.[2]

We cannot avoid therefore distinguishing between inviolability and jurisdictional immunity of mission premises. However it's worthy mentioning that the former covers the premises of the mission including the private residences of staff members by virtue of the first paragraph of article 30, the latter is accorded only to the staff of the mission in various extents depending on their ranks. This distinction will be further discussed in connection with tax exemption below.

[2] See in that regard: Preliminary report on the topic of jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur (UN Document A/AC.4/323)

As a matter of fact the building, where the Permanent Mission of India to the United Nations is located, is owned by the Mission itself as a State organ on behalf of the State of India. Consequently, as the VCDR is irrelevant as regards immunity from jurisdiction[3] of the Mission, the question should be considered on the grounds of jurisdictional immunities of states and their property.

1.1. United Nations Convention on Jurisdictional Immunities of States and their Property

There is no international convention in force concerning jurisdictional immunities of States and their property. Nevertheless the General Assembly accepted by Resolution 59/38 of 2 December 2004 the United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter referred to as the CJISP), and invited states to become parties of it. There are currently 28 signatories – including India but excluding the US – to the CJISP which contains similar rules as the FSIA. Article 13(a) provides that *"unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of any right or interest of the state in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the state of the forum."*

In connection with this exception from the general rule of jurisdictional immunity the International Law Commission explains in its Commentary to article 13 that the expression "rights and interests" is *"used as a term to indicate the totality of whatever right or interest a State may have under any legal system."*

Although the Commentary highlights that *"[t]he provision of article 13 is, however, without prejudice to the privileges and immunities enjoyed by a State under international law in relation to property of diplomatic missions and other representative offices of a government…",* as it was pointed out earlier, diplomatic missions do not enjoy jurisdictional immunity under the VCDR[4], which applies by virtue of reference of article 3(1)(a) of the CJISP.

Nevertheless it should be observed that *pro primo (i)* – as Special Rapporteur S. Sucharitkul refers to it[5] as the sole international convention in force on the subject – the European Convention on State Immunity (1972, hereinafter referred to as ECSI)) has the same objective and very similar wording as the CJISP, and *pro secundo (ii)* – as the House Report explains[6] – the FSIA was construed by the US Congress having in front of it the text of the European Convention on State Immunity. Moreover it entered into force in the same year as the FSIA, with which it has identical theoretical basis and similar wording.

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[3] Article 31(1) of the Vienna Convention on Diplomatic Relations deals with the immunity from the jurisdiction of the host State accorded to diplomatic agents.
[4] Nevertheless the cited provision of the CJISP is not totally pointless inasmuch as certain premises of the mission may enjoy inviolability under the VCDR.
[5] Fifth report on jurisdictional immunities of States and their property, Y. B. of the ILC 1983 Vol. II(1) p. 51
[6] See in that regard the Brief for the United States as Amicus Curiae supporting Petitioners (Supreme Court of the US No. 06-134)

1.2. The European Convention on State Immunity

In terms of objectives the Introduction of the Explanatory Report to the ECSI provides, that:

"1. "State immunity" is a concept of international law, which has developed out of the principle par in parem non habet imperium, by virtue of which one State is not subject to the jurisdiction of another State.

2. For many years State immunity has occupied the attention of eminent jurists. It is also the object of abundant case law. The development of international relations and the increasing intervention of States in spheres belonging to private law have posed the problem still more acutely by increasing the number of disputes opposing individuals and foreign States.

There are, at present, two theories, that of absolute State immunity which is the logical consequence of the principle stated above and that of relative State immunity which is tending to predominate on account of the requirement of modern conditions. ***According to this latter theory, the State enjoys immunity for acts iure imperii but not for acts iure gestionis, that is to say when it acts in the same way as a private person in relations governed by private law****. This divergence of opinion causes difficulties in international relations. States whose courts and administrative authorities apply the theory of absolute State immunity are led to call for the same treatment abroad."*[7]

The spirit and the letter of the Explanatory Report on the restrictive immunity theory raises the question, whether a foreign mission to an international organization by denying to pay property taxes after its premises used for housing its staff members "acts in the same way as a private person in relations governed by private law."

The real property exception of the ECSI reads as follows: *"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to: a. its rights or interests in, or its use or possession of, immovable property; or b. its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum." (Article 9)*

The Explanatory Report to Article 9 of the ECSI explains that *"[a]rticle 9 covers inter alia: … 2. proceedings relating to mortgages whether the foreign State is mortgagor or mortgagee."* Albeit tax liens against real property have similar character to mortgages it's very important to emphasize a significant difference thereof.

Although the issue at stake is the procedural question of bringing a suit against the State of India seeking the verification of validity of tax liens, the legal basis for tax liens is obviously inherent in national tax law. Tax law in most legal systems falls within the category of public law. To ensure that such discrepancies do not hinder the application of the ECSI, its Explanatory Report unambiguously declares that the *"immovable property" exception "covers inter alia proceedings relating to payments due from a State for the use of immovable property, or of a part thereof, in the state of the forum,* ***with the exception of dues or taxes.****"*

[7] http://conventions.coe.int/Treaty/en/Reports/Html/074.htm

The Report further explains, that *"[c]ustoms duties, taxes, penalties and fines have been excluded because in some countries they do not fall exclusively under public law or because the dividing line between public and private law is ill-defined or non-existent."*

In the light of the rationale behind this "exception from the exception" rule, it seems to be clear that the decisive factor in order to determine the scope of the "immovable property" exception is whether the legal bases of the action in issue falls under private law or public law.

As per tax liens are governed by tax law, and tax law is a public law issue, the present case fails to fulfil one of the necessary preconditions of qualifying as an exception from the general rule of jurisdictional immunity of states. As the preconditions are conjunctive, the question, whether the State of India acted in the same way as a private person, can be ignored.

In sum the interpretation of the US Supreme Court seems to contradict to the theoretical basis of FSIA, the restrictive immunity theory eventually, and particularly to the European approach.

2. Exemption from taxation

2.1. The Headquarters Agreement

First of all, paragraph (4) of section 15 of article V of the Headquarters Agreement 1947 (hereinafter referred to as the HQA) extends the scope of privileges and immunities of the diplomatic envoys accredited to the US to the resident representatives of the Members of the UN.

2.2. Relevant case-law

In terms of customary international law, the question of taxation was examined in detail in the decision of the Supreme Court of Canada of 2 April 1943[8], entitled: *"[i]n the matter of reference as to the powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockeliffe Park to levy rates on Foreign Legations and High Commissioner's Residences."* The City of Ottawa levied rates on the property of foreign legations and the question arose whether it was competent to do so. The majority of the Court decided that no local taxes could be imposed on such property belonging to foreign States.

The judgment goes on defining these taxes as lien upon the land, by virtue of which the land may be sold by the competent authorities and the proceeds of the sale applied in payment of taxes due and unpaid. In the opinion of the Court, such a sale involves *coactio*, which might oblige the foreign State to appear before the local judicial authorities in an attempt to assert its rights. The Court also held that *"…the creation of the charge amounts to the creation of a jus in re aliena, to a subtraction from the property of the foreign sovereign."* The Court finally held that such taxes could not be collected from a foreign sovereign or from his qualified representative and that consequently such property could not be listed on the assessment roll.[9]

[8] Lauterpacht (ed.), Annual Digest and Reports of Public International Law Cases, 1941-1942, pp. 337 ff.
[9] See *inter alia* the Yearbook of the ILC 1956, Vol. II. Pp. 169-170

2.3. The Convention on the Privileges and Immunities of the United Nations

Secondly, Article IV of the Convention on the Privileges and Immunities of the United Nations 1946 (hereinafter referred to as the General Convention) is applicable to the privileges and immunities of the members of the United Nations. The United States of America acceded to the General Convention on 29 April 1970.

The General Convention contains no provision on the privileges and immunities of mission premises. The above cited Article covers the representatives of the Members. Section 16 provides, that *"In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of the delegations."* It basically covers natural persons, but not the mission itself.

It should be noted that the Secretariat prepared a study on the practice of the United Nations concerning its status, privileges and immunities[10]. It is evident from the Study that the US maintained similar practice concerning tax issues even at that time (1967). 418 of the Real Property Tax Law of the State of New York, came into effect on 14 April 1960, was amended to read as follows: *"If a portion only of any lot or building of any such government or representative is used exclusively for the purposes herein described, than such portion only shall be exempt and the remainder shall be subject to taxation (…)."*

The expression "purposes herein described" means: *"exclusively used for the purposes of maintaining offices or quarters, for such representative with the rank of ambassador or minister plenipotentiary."*[11]

This practice reflects the state of evolution of the privileges and immunities of the members of the UN in 1967, based on the Headquarters Agreement and on customary international law. At that time the US was neither a party to the General Convention, nor to the VCDR, so the tax exemption of mission premises was rather a matter of international courtesy[12] that an international treaty obligation.

2.4. The Vienna Convention on Diplomatic Relations

The first question in that regard which is inevitable to answer is the applicability of the VCDR to the permanent missions to the United Nations. At the time the HQA was concluded, diplomatic immunities and privileges existed only at a level of customary international law. Later on the International Law Commission codified this previously existing customary law in an international convention, namely in the VCDR which applies exclusively to inter-state relations.[13]

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[10] Yearbook of the International Law Commission, 1967, Vol. II. pp. 154-324
[11] Ibid., paragraph 139.
[12] Diplomatic intercourse and immunities – Memorandum prepared by the Secretariat (ILC Yearbook 1956 Vol. II. pp. 137)
[13] Paragraph 52 of the Introduction of the ILC to the Draft Articles on Diplomatic Intercourse and Immunities 1958 provides that *"Apart from diplomatic relations between States, there are also relations between States and international organizations…However these matters are, as regards most of the organizations, governed by special conventions."*

The Legal Counsel of the United Nations, in his statement at the 1016th meeting of the Sixth Committee of the General Assembly, on 6 December 1967 stated that although the VCDR does not directly apply to representatives to international organizations, *"[m]aterial provisions of the Convention, however, are recognized as evidentiary of general or customary international law binding on all Members of the international community."* In the opinion of the Legal Counsel provisions of the VCDR appears to be relevant *mutatis mutandis* to representatives to United Nations organs. Although he admits that some provisions such as those relating to reciprocity have no relevancy in the situation of representatives to the United Nations.[14]

The Note Verbale dated 23 April 1981 from the Permanent Representative of the United States Mission to the United Nations addressed to the Chairman of the Committee, provides a compilation of international treaties, local laws and regulations, which *"the diplomatic community in New York would find useful in day-to-day activities."* Annex IV of the list is the VCDR, strengthening further the recognition of its applicability in that context.

However the Permanent Mission of India to the United Nations claims exemption from taxation *inter alia* on the grounds of Article 34 of the VCDR, the cited Article has nothing to do with premises owned by the sending State. It applies exclusively to the diplomatic agents themselves who – in the present case – were not required to pay real property taxes at all. Real property tax is a direct tax, which has to be paid by the owner.

Article 23(1) of the VCDR deals with the exemption from taxation of mission premises providing that *"[t]he sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased …."*

The VCDR contains two definitions on the meaning of the "premises of the mission". Article 1(i) of the VCDR provides that *"[t]he 'premises of the mission' are buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."*

The Commentary of the International Law Commission to draft Article 20 on Inviolability of mission premises (later Article 22) gives a somewhat broader definition. It provides that *"[t]he expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park."*[15]

It seems to be very difficult to argue that those premises owned by the sending State and used exclusively to provide accommodation for its staff members are not 'premises used for the purposes of the mission' inasmuch as it would be impossible to perform the functions of the mission[16] without staff members who are in most cases not citizens or permanent residents of the host State and therefore need to be quartered during their assignments.

[14] Published in the United Nations Juridical Yearbook 1967 pp. 311-312
[15] Y. B. of the ILC 1958 Vol. II pp. 95
[16] See in that regard Article 3 of the Vienna Convention on Diplomatic Relations

2.5. The *travaux préparatoires*

During the *travaux préparatoires* the question of possible interpretations of the scope and meaning of "mission premises" was raised by various Governments. In its observation on the draft articles concerning diplomatic intercourse and Immunities adopted by the International Law Commission at its ninth session in 1957, the Japanese Government submitted, that *"[t]he term 'premises' could be interpreted as either (a) only the official residence of an ambassador or a minister, and the chancellery; or (b) all accommodations (including housing facilities for the members of a mission) owned or leased for diplomatic purposes by a sending State; or (c) all accommodations used for diplomatic purposes (including private dwellings of diplomatic agents)."*[17]

The United States of America submitted on draft article 17 (later article 23), that *"[t]he Unites States Government agrees with this article, if it is intended to grant an exemption from taxes in respect of the premises of a diplomatic mission for which the foreign government concerned would be liable either as owner or lessee."* The observation goes further contending that*"…the article fails to clarify the particular categories of property which shall be considered as constituting the premises of the mission"* The US therefore proposed to revise the article to read as follows: *"…For the purposes of this article, property used for legation purposes shall be deemed to include the land and buildings used for the embassy or legation, the chancery and all annexes thereto, and residence for officers and employees of the mission."*[18]

On the 457th meeting of the International Law Commission on 21 May 1958, Special Rapporteur, Mr. A. E. F. Sandstrom proposed to insert the word "official" before the word "premises" in draft article 16(1) (later article 22) on the inviolability of mission premises. Because the majority of the members simply could not understand the reason for such distinction, Mr. Sandstrom explained that *"…as not strictly 'official' premises he had had in mind dwellings specially provided by the mission for its staff."* Moreover the Special Rapporteur also explained that *"…although the distinction between official and unofficial parts of the premises of a mission did not … affect the question of inviolability, it might be relevant to article 17, which dealt with the exemption of premises from taxation."* After Mr. G. I. Tunkin (USSR), in opposing the addition of the word "official", pointed out that *"… it was clear enough from the text as it stood that the mission's premises were the premises used for the functions of the mission. The addition would merely lead to confusion and might be interpreted as implying that only the offices of the mission were to be regarded as official premises"*[19], in the light of the "trend of the discussion" Mr. Sandstrom finally withdrew his proposal for the insertion of the word "official".

In order to meet the desire of the Japanese and United States Governments for a definition of mission premises, Mr. Sandstrom suggested explaining in a commentary what was meant by the premises of the mission and its appurtenances. The finally adopted text of the Commentary is a Commentary to draft article 20 on the inviolability of mission premises, and it does not expressly include the residences of staff members, because they are already included by virtue of reference in article 29. This latter article defines the scope of article 22 extremely broad by including the *private residences* of the diplomatic and the technical and administrative

[17] Y. B. of the ILC 1958 Vol. II pp. 120
[18] Y. B. of the ILC 1958 Vol. II pp. 136
[19] Summary record of the 457th meeting; Y. B. of the ILC 1958 Vol. I pp. 127-128

staff members. It seems to have even more importance in the light of the language of the preparatory works, where the term "official residences" was also commonly used.[20]

The finally adopted explanatory provision, subparagraph (i) of article 1 was jointly proposed by the Byelorussian Soviet Socialist Republic and Bulgaria and was amended by the proposal of Japan with the addition of the "residence of the head of the mission." It seems logical that the rationale behind this latter amendment was the fact that the embassy and the residence of the ambassador are usually in different locations for *inter alia* protocol reasons. The draft article, as amended, was adopted unanimously.[21]

Apparently, in the context of the negotiating history of the VCDR, the drafters did not want to limit the scope of the term "mission premises" to official premises of the mission and therefore the residences of the staff of the mission owned or leased by the mission should be included to the definition of "mission premises" as regards tax exemption.

After 1972, when the US acceded to the Vienna Convention on Diplomatic Relations (1961), the US failed to change its practice and its interpretation of tax exemption remained undisturbed. If the relevant international agreement was properly implemented to national law, the unnecessary limitation of tax exemption rules should have been abolished standing on the general scope of paragraph 1Art. 23.

2.6. The Practice of the United Nations

In 1972 the Country Working Group of the Committee on Relations with the Host Country (hereinafter referred to as the Host Country Committee) studied the question of exemption from real estate taxation of the premises used by permanent missions to the United Nations, or by members of their staff.[22] "*In the course of its examination of this topic the attention of the Working Group was drawn to the fact that there appeared to be considerable variations in the practice followed by Member States in their implementation of article 23 of the Vienna Convention on Diplomatic Relations of 1961.*"[23]

The Working Group therefore requested the Legal Counsel of the United Nations in 1973 to provide information on the practice of UN Member States. Upon this request the Legal Counsel sent out a questionnaire on 19 June 1973 to the Governments of the Member Sates requesting them to submit information on their own practice. Based on the replies received from the Governments of 70 Member States the Legal Counsel prepared a comprehensive study on the issue in a form of a note and submitted it to the Working Group. The study found out with respect to the *"extent of the exemption from taxation with regard to premises owned by the sending State or on its behalf for the purpose of providing residential accommodation for other [then the head of mission] members of the mission staff"* that *"[t]he trend of the practice … is not clear…. In fact the exemption is total in many countries, but only partial in others, and in still other countries there is no exemption at all.'*[24]

[20] See for example the Y.B. of the ILC 1956 p.170 (301)
[21] United Nations Conference on Diplomatic Intercourse and Immunities (A/CONF.20/14)
[22] See UN Doc. A/AC.154/WG.1/L.1
[23] See UN Doc. A/AC.154/WG.1/L.2, page 3 paragraph 1.
[24] See UN Doc. A/AC.154/WG.1/L.2, page 5 paragraph 12.

Certainly the response of the US Permanent Representative to the circular of the Secretariat is of particular interest. The alternate Representative for Special Political Affairs of the United States to the United Nations states in his reply[25] that *"[e]xcept as provided by treaty or special legislative enactment, premises owned by the sending State or on its behalf and used for the purposes of providing residential accommodation for other members of the mission staff are not entitled to tax exemptions."*[26] In the same letter the US representative explains that real property taxes are levied for the purpose of providing revenue for individual states or localities to support public services such as schools, fire protection, garbage and trash removal, etc. It's very important to note that under the given circumstances the Member States are forced to use their financial resources to sustain and improve certain public services of the host country which constitutes upon them an undue financial burden.

Nonetheless the representative of the US, in a statement to the Working Group explained that *"the exemption granted by article 23 of the Vienna Convention on Diplomatic Relations was applicable only to taxes borne directly by the sending State or the head of the mission. … Exemption was granted by 418 of New York State Real Property Tax Law to the full extent required by the Vienna Convention."*[27] The first and the last sentence of the statement seem to contradict to each other. While real property tax is a direct tax imposed and borne directly by the sending State the cited provision of the New York State Law makes the exemption from taxation of a foreign mission conditional on the purposes of the use of its premises withholding the effect of an international treaty in force.

The US representative stated further that on the basis of reciprocity some States had entered into bilateral agreements with the US whereby the parties had granted each other exemptions from real estate taxes beyond what was required under the VCDR.[28] The issue of reciprocity will probably be examined by the District Court when considering the merits of the case. However we have to see that while the respondent has an interest in collecting taxes for New York City budget, reciprocal restrictions on foreign US missions would place a considerable burden on the federal budget. In that context the *amicus curiae* of the State Department is understandable.

The report of the Sixth Committee on agenda item 112 [A/10429][29] was adopted unanimously by the General Assembly on the 2440th Plenary Meeting in 1975. By then the question of real property taxes seems to have lost importance inasmuch as it was not even mentioned in the text of the Resolution.

In 1978 the Office of Legal Affairs pronounced its views[30] on a claim by a Member State to real estate tax exemption for a residential property situated in Westbury Village, in New York State. After analyzing the relevant provisions of the HQA and the VCDR, the letter refers to the *traveaux préparatoirs* noting that the United States representative at the twenty-third meeting

[25] See UN Doc. A/AC.154/WG.1/L.2/Add.1
[26] See UN Doc. A/AC.154/WG.1/L.2/Add.1 paragraph 3.
[27] See UN Doc. A/AC.154/84 pp. 3-4 paragraph 14.
[28] Report of the Committee on Relations with the Host Country; GA 29th Session, supplement No. 26 (A/9626) pp. 26 paragraph 6.
[29] Agenda item 112: Report of the Committee on Relations with the Host Country; Report of the Sixth Committee
[30] Letter to a Private Lawyer; published in the Juridical Yearbook of the United Nations 1978 pp. 187-188.

of the Committee of the Whole, during its consideration of draft article 21 (later article 23 of the VCDR) stated that *"…the expression 'premises of the mission' used in article 21 and other articles had not been defined; that was a gap which should be filled. In this delegation's opinion, the expression should comprise the land and all the buildings of the mission, even if scattered."*[31] The Office of Legal Affairs advises the interpretation and application of article 23 of the VCDR to be *"based on the legal facts stated in the preceding."*

In 1986 the question whether a Member State is exempted from real estate taxes on apartments purchased by its permanent mission to the United Nations for the exclusive use of the diplomatic staff of the mission was once again raised by a Deputy Permanent Representative to a Member State.[32] The letter refers *inter alia* to the note by the Secretariat on the Practice followed by Member States in exempting diplomatic missions from real estate taxes[33] reiterating the position taken by the US representative stated above. The Legal Counsel notes that in his understanding *"…this remains the position of the United States. Accordingly, it would appear that the question of the exemption of a Member State from real estate taxes on premises owned by its mission and used for residential accommodation of the mission staff is always subject to reciprocity and depends on the existence of a treaty or special legislative enactment with the Member State concerned."*

The present judgment has undoubtedly generated turmoil in the diplomatic community in New York City. It seems to be inevitable that the Legal Counsel of the United Nations sooner or later will be requested to give a comprehensive opinion on the issue. The delegate of India to the Host Country Committee already raised the question on 9 July 2007 at the 233rd Meeting as follows:
"Under other matters, India's representative asked about the host country's position on the Supreme Court's interpretation of immunity from jurisdiction with respect to diplomatic properties, under which the Indian Government and others had immunity and were not liable for property tax on their respective portions of the buildings they occupied."[34]

3. Enforcement

Because the present judgment of the US Supreme Court is of a procedural character it cannot be physically enforced. Nevertheless the Permanent Mission of India may continue to deny the jurisdiction of the District Court. In that regard the Secretary of State of the United States distributed Circular Note 07-146 dated 28 June 2007 to the Chiefs of Mission in Washington, D.C. and informed them *inter alia* on the following: *"[i]n the event a lawsuit is filed against a foreign state in a court in the United States, the foreign state should retain private counsel and address jurisdictional and other defences, including claims of sovereign immunity, to the court."* However, even if India asserts immunity before the District Court it will not, after the affirmative decision of the Supreme Court on the procedural issue, cause any difficulty for the court to deliver a opinion on the merits of the case.

[31] Twenty-third meeting of the Committee of the Whole, paragraph 49.
[32] Letter to a Deputy Permanent Representative of a Member State; published in the Juridical Yearbook of the United Nations 1986 pp. 327-328.
[33] Discussed in the second paragraph of this title.
[34] See Press Release of the UN Press Centre HQ/656

Nonetheless the judgment on the merits will not be enforceable. Article 22(3) of the VCDR provides that *"[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."* However, New York City claimed, that the declaration of validity of the tax liens at stake is necessary for three reasons: *"First, once a court has declared property tax liens valid, foreign sovereigns traditionally concede and pay. Second, if the foreign sovereign fails to pay in the face of a valid court judgment, that country's foreign aid may be reduced by the United States by 110% of the outstanding dept. Third, the liens would be enforceable against subsequent purchasers."*[35]

4. Implications

After the present judgment there is no procedural obstacle in the United States to sue any foreign State in order to collect unpaid real estate taxes. The District Court can continue the main proceedings and consider the merits of the case. It is very unlikely that the Court will rule otherwise than confirming the validity of the tax liens in question standing on grounds of national legislation. Assuming that the District Court finds the claim of New York City well founded the litigation can easily end up in The Hague before the International Court of Justice inasmuch as both States – India and the US – are parties to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

Another possibility is to request an advisory opinion from the International Court of Justice on the interpretation of Article 23(1) of the VCDR. Article 65(1) of the Statute of the International Court of Justice requires the Court to *"…give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."* As per the "bodies authorized to make such request" Article 96(1) of the Charter of the United Nations briefs us as follows: *"[t]he General Assembly … may request the International Court of Justice to give an advisory opinion on any legal question."* The second paragraph of the cited article provides that *"[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."*[36]

In the present case the request itself, after considered in the Sixth Committee, should be made in the form of a resolution by the General Assembly. The procedure followed in the adoption of the draft resolution containing the request for an advisory opinion on the matter is not in any way different from that followed in the adoption of draft resolutions on other matters by the General Assembly.[37]

Although an advisory opinion would not be binding on the parties of the analyzed opinion, it would throw a light on the possible consequences of an international dispute and more importantly would unambiguously clarify the material scope of article 23(1) of the Vienna Convention on Diplomatic Relations by this avoiding future misunderstanding.

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[35] See 551 U.S. June 14, 2007.
[36] The list of those United Nations organs and specialized agencies which are at present authorized to request advisory opinions can be found in the Yearbook of the International Court of Justice 2002-2003 pp. 118-119.
[37] See in that regard: The Repertory of Practice of United Nations Organs Vol. V. paragraph 17.

Sources

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2. Study of the Secretariat 1967 paragraphs 139-143 (A/CN.4/L.118 and Add.1 and 2)

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2. Draft Articles with commentaries 1958 (2) to article 20 and (1) to article 21
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4. Summary Records of the 457th Meeting of the International Law Commission (A/CN.4/SR.457)
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2. General Assembly 30th Session 2440th Plenary Meeting Agenda Item 112
3. Report of the Committee on the Relations with the Host Country 1975 30th Session supplement No. 26 (A/10026)

4. Report of the Committee on Relations with the Host Country 1974 29th Session supplement No. 26 (A/9626)
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3. Letter to a private Lawyer (20 April 1978)
4. Statement made by the Legal Counsel at the 1016th meeting of the Sixth Committee of the General Assembly on 6 December 1967

VIII. Relevant Case-law

1. Jurisdiction over Yugoslav Military Mission (Germany) Case (1962)
2. Hungarian Embassy Case (1969)

IX. Opinion of the Supreme Court of the United States
The opinion of the Court may be downloaded from the following website:
http://www.supremecourtus.gov/opinions/06pdf/06-134.pdf