Permanent Mission of India to the United Nations v. City of New York: The Death of Sovereign Tax Immunity?

I. OVERVIEW

The City of New York sought judgment in state court to validate $16.4 million in liens from unpaid property taxes owed by the government of India as of February 1, 2003.[1] According to the City, the taxes were owed on a twenty-six story building used to house members of India's permanent mission to the United Nations.[2] The property consisted of both diplomatic offices and complimentary residential units provided to employees and their families by the government of India.[3] Under New York City law, diplomatic offices and ambassadorial residences are exempt from local property taxes.[4] However, if a foreign government does not use its property *exclusively* for offices *or* if it houses lower level officials and staff, New York tax law requires that the potential revenue be bifurcated from official and upper level sources and be paid on the remaining portions.[5] City law then allows those unpaid taxes to be converted into liens.[6]

The government of India removed the case to federal district court, where it argued that the court lacked jurisdiction due to immunity granted by the Foreign Sovereign Immunities Act of 1976 (FSIA).[7] The FSIA provides presumptive immunity to sovereign states in a general

1. Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2354-55 (2007). At the same time, the City of New York also sought judgment against the People's Republic of Mongolia for liens against its Ministry of Foreign Affairs building. *Id.*

2. *Id.* at 2354.

3. *Id.*

4. *Id.*

5. *Id.* at 2354-55. City law limits the residence exclusion to those ranking at the level of "ambassador or minister plenipotentiary," which will be addressed later. *Id.*

6. *Id.* at 2355. The City acknowledged that even with a court-sanctioned validity of the liens, the States of India and Mongolia would be immune from foreclosure on the buildings. The City proceeded on the belief that a judgment might either induce voluntary payment or might encourage assistance from the federal government through the withholding of foreign aid. *Id.*

7. *Id.* at 2355.

immunity clause.[8] This immunity can only be revoked by specific exceptions.[9] The City argued that the exception regarding rights in "immovable property" applied to the liens and to the City as lien-holder.[10] The Supreme Court of the United States *held* that "rights in immovable property" are invoked when seeking the validity of tax liens, and therefore, no immunity was provided under the FSIA to prevent a court from hearing suits regarding the legitimacy of the liens. *Permanent Mission of India v. City of New York*, 127 S. Ct. 2352, 2355-56 (2007).

II. BACKGROUND

In the United States, the FSIA provides the sole basis upon which jurisdiction over a foreign nation may be invoked.[11] The purpose of the Act was to codify aspects of contemporary international law, especially those concerning commercial and diplomatic practices.[12] The FSIA also served to assist in the transition of the official State Department position from recognizing "absolute" sovereign immunity to the modern "restrictive" theory of sovereign immunity in the decades after World War II.[13]

The guiding principles of absolute sovereign immunity in American jurisprudence were laid down by Chief Justice John Marshall in *The Schooner Exchange v. McFaddon* in 1812.[14] In *The Schooner Exchange*, a U.S. citizen petitioned the Court to adjudicate the rightful ownership of a vessel commandeered by the French military pursuant to a decree by Emperor Napoleon Bonaparte.[15] Marshall was careful to expound upon the "perfect equality and absolute independence" of sovereign nations,[16] emphasizing the mutual benefits of trade between nations having absolute jurisdiction within their sovereign boundaries.[17] But Marshall also recognized that international custom allowed immunities to be granted to sovereigns and their agents who ventured outside the bounds of their respective nations.[18] Marshall explained this magnanimity as a mutual understanding among sovereigns not to degrade one another by

8. *Id.*
9. *Id.*
10. *Id.* at 2355-56.
11. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989).
12. *Id.* at 435.
13. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983).
14. The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812).
15. *Id.* at 117.
16. *Id.* at 137.
17. *Id.* at 136.
18. *Id.* at 137-38.

exercising jurisdiction that was their right, but that they would abhor if inflicted upon themselves by others.[19] While Marshall also delineated between inherently sovereign functions and private actions (such as property ownership) made by princes acting as individuals,[20] *The Schooner Exchange* came to stand for extending absolute immunity to foreign sovereigns.[21]

This absolute immunity remained the norm (at least for friendly nations) until 1952.[22] At that time, the State Department announced its adoption of a "restrictive" view of sovereign immunity in what came to be known as *The Tate Letter*.[23] This letter to Attorney General Philip B. Perlman from Jack B. Tate, the State Department's Acting Legal Adviser, explained that the executive branch believed granting special immunity to state actors was inconsistent with basic tort and contract law in a commercial setting.[24] The solution was therefore to distinguish between public acts of the sovereign, which would continue to receive immunity, and private acts which would be vulnerable to the same jurisdiction as other private commercial actors.[25] *The Tate Letter* specifically denied immunity with respect to real property but left open the traditional exception for diplomatic and consular properties.[26]

This distinction between public and private acts proved troublesome and often intruded into delicate foreign relations matters.[27] It created confusion between the roles of the executive branch (facilitating international relations) and the judiciary (adjudicating commercial matters).[28] The State Department often intervened on behalf of foreign nations, requesting that immunity be granted for "political considerations" irrespective of the proper result under the restrictive theory.[29] The courts grew accustomed to looking to the executive branch for guidance, and their decisions were inconsistent and lacked coherent standards.[30] It was this need for clarity and consistency that led Congress to enact the FSIA in 1976.[31]

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19. *Id.*
20. *Id.* at 144-45.
21. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).
22. *Id.* at 486-87.
23. 26 Dep't. State Bull. 984-985 (1952).
24. *Id.*; Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 714 (1976).
25. *Id.* at 712.
26. *Id.* at 711-12.
27. *Verlinden*, 461 U.S. at 486-87.
28. *Id.* at 487-88.
29. *Id.* at 487.
30. *Id.* at 488.
31. *Id.*

Congress intended for the FSIA to be the sole source of jurisdiction over foreign nations,[32] ensuring that decisions were being made on "purely legal grounds."[33] The Act granted general immunity to foreign sovereigns,[34] revoked only under specific exceptions.[35] The FSIA was interpreted by the courts as overriding earlier sources of jurisdiction.[36] In addition to the commercial exceptions of the FSIA, the Act disallowed immunity in actions where "rights . . . in immovable property situated in the United States are in issue."[37]

Internationally, the codification of diplomatic and consular rights in the form of the United Nations Vienna Convention on Diplomatic Relations of 1961 (Vienna Convention) ran parallel to the acceptance of the restrictive theory of sovereign immunity.[38] The Vienna Convention encompassed many of the traditional etiquette and comity practices developed for centuries and described by Marshall in *The Schooner Exchange*. The Vienna Convention defines the immunities and rights extended to different levels of ambassadors, agents, staff, and their families.[39] Like the FSIA, the Vienna Convention provides an exception from immunity for cases relating to private, immovable property.[40] However, this provision is specifically contrasted to the situation where an agent retains the property "on behalf of the sending State for the purposes of the mission."[41] Article 34 also exempts the sending state and its diplomatic agent from all taxes due on real personal property if held "for the purposes of the mission."[42] While the immunities and rights are generally restricted by class of ambassador, the property tax exemptions extend to family, administrative, and technical staff.[43]

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32. Argentine Republic v. Amerada Hess, 488 U.S. 428, 434 (1989).

33. *Verlinden*, 461 U.S. at 488.

34. 28 U.S.C.A. § 1602 (2006).

35. *Id.* § 1605. Exceptions include waiver of immunity by a foreign state, violations of international law including acts of terrorism, and commercial transactions involving the United States here and abroad. *Id.*

36. *Amerada Hess*, 488 U.S. at 433. Earlier sources include, for example, any jurisdiction over sovereigns provided by the Alien Tort Statute.

37. 23 U.S.C.A. § 1605(a)(4).

38. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, 23 U.S.T. 3227 (1972) [hereinafter Vienna Convention]. The Vienna Convention was drafted in 1961 and ratified by the U.S. Senate in 1965, although it was not signed by the President—officially becoming U.S. law—until 1972. *Id.*

39. *Id.*

40. *Id.* § 31(1)(a).

41. *Id.*

42. *Id.* § 34(b).

43. *Id.* § 37(1-2).

In an early analysis of the Vienna Convention, the State Department supported a broad interpretation of the exemption from property taxes.[44] Acting Legal Advisor Richard Kearney wrote to the New York Court of Appeals hearing *Republic of Argentina v. City of New York*, a case involving tax liens against consular property, which is markedly similar to the noted case. Kearney encouraged the court to find for Argentina.[45] It was the position of the State Department that Argentina was exempt from property taxes according to international law and that a broad reading of the exemption was preferred due to the administrative difficulties (and diplomatic tensions) of determining which government-held property was held for what purpose.[46] The Court of Appeals agreed with the State Department and found that the liens created a "direct interference" with property held by a foreign state for consular purposes and were therefore unlawful.[47] The court held that the determinative factor was not whether the property was owned for a diplomatic purpose but whether it was held for a public or governmental (as opposed to commercial) purpose.[48]

Also available to aid interpretation at the time of the enactment of the FSIA were various legal restatements. The *Restatement (First) of Property* explained the legal rights and obligations of lien-holders, including their real interest in the property, which has changed little over time.[49] The *Restatement (Second) of Foreign Relations Law* explained the position, stated above, that sovereign nations were not immune from jurisdiction pertaining to immovable property,[50] but diplomatic property is again distinguished from this general rule.[51]

III. THE COURT'S DECISION

In the noted case, the Court considered only whether a court could adjudicate on the validity of the liens held by the City of New York in light of the immunity granted to foreign sovereigns under the FSIA.[52] To do this, the City's interest in immovable property must be sufficient to qualify as an exception to the jurisdictional immunity hurdle of the

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44. Republic of Argentina v. City of New York, 250 N.E.2d 698, 700 (N.Y. 1969).
45. *Id.*
46. *Id.*
47. *Id.* at 702.
48. *Id.* at 704.
49. RESTATEMENT (FIRST) OF PROPERTY § 504 (1944).
50. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 68(b) (1965).
51. *Id.* § 68(f).
52. Permanent Mission v. City of New York 127 S. Ct. 2352, 2354 (2007).

FSIA.[53] The Court acknowledged dual purposes of the FSIA, to codify the restrictive view of sovereign immunity and to codify the existing international law at the time of enactment, and it proceeded to weigh these two competing strands of jurisprudence.[54]

Because the FSIA represents the sole basis upon which jurisdiction over a foreign sovereign may be based,[55] the Court chose to closely analyze the text of the FSIA against norms of property rights at the time of enactment.[56] India argued that the immovable property exception in the FSIA was limited to instances of contested ownership and possession.[57] Reasons for this limited view are that smaller obligations, although technically considered "rights" under U.S. property law, threaten to "swallow the rule"[58] by subjecting foreign sovereigns to any number of tort-type claims. Nations that would otherwise be immune to these claims under diplomatic exceptions would now be subjected to claims simply because the sovereign had some tenuous connection to the immovable property—such as liability in slip-and-fall cases occurring on the premises.[59]

The Court disagreed, explaining that while the exceptions to immunity are specifically enumerated, they are nevertheless broad.[60] The text of the immovable property exception itself broadly encompasses "rights in" that property.[61] It does not exempt any categories of rights and, specifically, taxes and rights derived from taxes are not exempt.[62] The Court consulted a contemporary version of *Black's Law Dictionary* and decisions assessing the Bankruptcy Code to discern the property law status of liens in 1976.[63] The Court also measured New York law against these sources to assure congruence.[64] The consensus among these authorities was that liens are a "legal right" or "incumbrance."[65] The effect of this legal right is to produce a nonpossessory interest which runs with the land.[66] Because this interest runs with the land, affects the

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53. *Id.*
54. *Id.* at 2356.
55. Argentine Republic v. Amerada Hess, 488 U.S. 428, 439 (1989).
56. *Permanent Mission of India*, 127 S. Ct. at 2356.
57. *Id.* at 2355.
58. *Id.* at 2359 (Stevens, J., dissenting).
59. *Id.* at 2357.
60. *Id.* at 2356.
61. *Id.*
62. 28 U.S.C.A. § 1605 (2006).
63. *Permanent Mission of India*, 127 S. Ct. at 2356.
64. *Id.*
65. *Id.*
66. *Id.*

property at the time of sale, and is not specific to the landowner, the Court reasoned that liens sufficiently affect the basic rights of ownership so as to be considered "rights in immovable property."[67]

The Court supported this textually based approach by explaining that a key purpose of the FSIA was to implement the restrictive theory of sovereign immunity through judicial principles.[68] Quoting from *The Tate Letter*, the Court laid out the initial State Department differentiation between public (*jure imperii*) and private (*jure gestionis*) acts of a foreign nation.[69] The Court found that even under the absolute theory of sovereign immunity espoused in *The Schooner Exchange*, Chief Justice Marshall believed that property ownership was not an inherently sovereign act and that, in some instances, a sovereign owning property in a foreign jurisdiction would be bound by the same laws as a private citizen owner.[70] Therefore, bolstered by such authorities as the contemporary *Restatement (Second) of Foreign Relations Law* as well as two-centuries-old precedent, the Court appeared comfortable in its interpretation of a broad exception to sovereign immunity for cases arising from rights in immovable property, including liens against that property.

When assessing the second purpose of the FSIA—the codification of international law—both India and the City of New York argued that the Vienna Convention supports their respective positions.[71] Unconvinced by India's interpretation of the Vienna Convention, that article 34 exempts diplomatic agents (and, by way of article 37, their families and staff) from taxation on private immovable property, the Court instead sided with the City.[72] The Court cited pre-Convention interpretations from 1957 regarding tax exemption when the property is held in the diplomat's name due to the strictures of local law disallowing ownership by the sovereign.[73] The Court did not specifically address the clauses in the Vienna Convention mentioning exemptions for properties held on "behalf of the sending State for purposes of the Mission," except to mention that India had brought this up in their brief.[74] The Court also

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67. *Id.*
68. *Id.*
69. *Id.* at 2356-57.
70. *Id.* at 2357.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2358.

looked to the United Kingdom, which had also decided against offering tax exemption for staff housing, without citing their specific reasoning.[75]

India next argued that the exemption from general immunity found in the Vienna Convention covers only "real actions" against immovable property.[76] India argued that to fully understand this implication, the Court should address the fact that this civil law term used in the drafting of the Convention is used to denote actions roughly analogous to *in rem* actions under common law.[77] Using this interpretation, the tax liens would not serve as a sufficient basis for jurisdiction because the original obligation (property taxes) was a personal obligation, not an action against the property.[78] The Court disagreed, referencing a Fifth Circuit decision from 1969 assessing the overlapping personal and real obligations created in actions related to property under a civil tradition.[79]

In his dissent, Justice Stevens acknowledged that a "literal application of the FSIA's text" to this sort of property law analysis does, in fact, support the majority's finding of a property interest sufficient to qualify as an exception under the immovable property section.[80] However, Justice Stevens, joined by Justice Breyer, disagreed with this literal reading as contrary to the spirit of the law.[81] The dissent emphasized that immunity granted to foreign sovereigns does not represent a *lack* of jurisdiction, but rather a positive grant of immunity in the "well-established" tradition of comity.[82] None of the seven enumerated exceptions makes any mention of tax liability, which the dissent interpreted to exclude this category rather than include it, as the majority did, in greater "rights in" property.[83] The dissent also found the majority's emphasis on "rights in immovable property" to be misleading.[84] Focusing on the tax liability would more clearly demonstrate the nature of the incompatibility of the City's claims against a foreign sovereign.[85] The dissent implied that the age and breadth of the

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75. *Id.* at 2357.

76. Chateau Lafayette Apartments v. Meadow Brook Nat'l Bank, 416 F.2d 301, 304 (5th Cir. 1969).

77. *Id.*

78. *Permanent Mission of India*, 127 S. Ct. at 2357-58.

79. *Chateau*, 416 F.2d at 304-05 (explaining that a mortgage is a real right in immovable property and that the rates of interest charged for the mortgage and the land rights held are conflated and interrelated "real" and "personal" obligations under the Louisiana Civil Code).

80. *Permanent Mission of India*, 127 S. Ct. at 2359.

81. *Id.* at 2358.

82. *Id.*

83. *Id.* at 2358-59.

84. *Id.* at 2359.

85. *Id.*

statute should have afforded it a less rigorous textual interpretation. Rather, more emphasis should have been placed upon the general grant of immunity leading to a narrower construction of the exceptions.[86] Finally, the dissent believed the presence of the Solicitor General petitioning as *amicus curiae* on behalf of India and Mongolia was particularly persuasive.[87] While the FSIA officially transferred responsibility for the interpretation of these issues to the judiciary, the wishes of the executive branch may still be considered to assess the impact of the decisions upon the United State's official positions on international law and relations.[88]

IV. ANALYSIS

The varied authorities referenced in the noted case produce two unremarkable consensuses: that liens represent an interest in immovable property[89] and that diplomatic properties are exempt from jurisdiction and municipal taxes under international law.[90] It was the unpleasant task of the Court, however, to discern which reasonable and long-held principle would stand if the two appeared to conflict when brought together under the FSIA.[91]

When enacting the FSIA, Congress specifically codified the notion that its provisions were "[s]ubject to existing international agreements."[92] This statement is found immediately before the general grant of immunity to foreign sovereigns (applicable in all cases but the stated exceptions).[93] The primary international law reference to diplomatic housing in 1976 was the Vienna Convention, which had been in effect internationally since 1961 and was officially codified by the United States in 1972.[94] Article 23 exempts the sending state from taxes owed on the "premises of the mission,"[95] which is defined in article 1 with an expansive listing of buildings and premises, including the residence of the "head of the mission."[96] Article 34 of the Vienna Convention states

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (majority opinion and Stevens, J., dissenting); Republic of Argentina v. City of New York, 250 N.E.2d 698, 700 (N.Y. 1969).
90. *See, e.g.*, Vienna Convention, *supra* note 38, 23 U.S.T. 3227 (1972); *Republic of Argentina*, 250 N.E.2d at 700; RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 68 (1965).
91. *Permanent Mission of India*, 127 S. Ct. at 2352.
92. 28 U.S.C.A § 1604 (2006).
93. *Id.*
94. Vienna Convention, *supra* note 38.
95. *Id.* § 23.
96. *Id.* § 1.

that a "diplomatic agent shall be exempt from all . . . taxes on private immovable property."[97] Finally, article 37 extends the benefits of articles 29 through 36 to lower-level diplomats and staff.[98]

The New York City law is careful to exempt those "with the rank of ambassador" from its taxation scheme.[99] As stated in the facts of the noted case, all residents of the building in question were below the level of "head of mission."[100] Under a careful reading of the Vienna Convention, the taxation of the sending state for housing of lower level mission members is not a violation of the treaty. However, judicial precedent from the Second Circuit, in *Republic of Argentina v. City of New York*, as well as State Department opinions from 1969 to 2007 imply that this technical interpretation is not congruent with broader understandings of diplomatic relations in international law.[101] In *Republic of Argentina*, the City of New York's justification for collecting taxes in the face of the Vienna Convention was that the United States had not ratified the treaty. The court of appeals rejected this argument, stating that in the absence of a positive statute or contradictory policy, the City should follow international law even if the United States was not officially a party.[102] Even contemporary explications of exceptions to immunity for property law distinguished this broad category of diplomatic immunity.[103]

In an odd juxtaposition of inconsistent diplomatic immunity considerations, the City of New York "concede[d]" that even with valid liens, India was "immune from foreclosure proceedings"—a seeming adherence to the more traditional diplomatic immunity view.[104] However, the City continued to pursue the matter because of the standing policy of the federal government to statutorily reduce foreign aid to these countries by 110% of the outstanding debt.[105]

Determining tax revenue and liability is one of the primary obligations of the United States Congress. As mentioned by the dissent in the noted case, tax liability is surely something Congress was aware of while drafting the FSIA and could easily have included in its provisions

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97. *Id.* § 34.
98. *Id.* § 37.
99. Permanent Mission of India v. City of New York, 127 S. Ct. 2352, 2354 (2007).
100. *Id.*
101. Republic of Argentina v. City of New York, 250 N.E.2d 698, 700, 704 (N.Y. 1969); *see, e.g.*, *Permanent Mission of India*, 127 S. Ct. at 2359.
102. *Republic of Argentina*, 250 N.E.2d at 700.
103. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 68(f) (1965).
104. *Permanent Mission of India*, 127 S. Ct. at 2355 n.1.
105. Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 543(a) (2006).

if Congress so chose.[106] Taxes were specifically addressed in the Vienna Convention, which was ratified by the United States and preserved in the FSIA.[107] The FSIA itself has provisions that specifically address the jurisdiction of maritime liens against foreign cargo vessels, giving further credence to the argument that the absence of tax liability and lien considerations in other provisions of the FSIA was not merely an oversight or part of an inclusive catch-all provision.[108]

Concerning the requirement under civil law that a "real action" be at issue in the Vienna Convention, the analogy between the noted case and *Chateau Lafayette Apartments v. Meadow Brook National Bank* is a bit strained. In *Chateau*, the Fifth Circuit was asked to decide the proper situs for suit in a case claiming a usurious mortgage rate issued by a bank in New York for property located in Louisiana.[109] The finding that real and personal (civil) obligations are conflated in a mortgage is easily understood: the mortgage simultaneously creates a repayment obligation (a "personal" obligation) and an interest in the property (a "real" interest) upon default.[110] This type of simultaneity is not present in the noted case. First, the City of New York issued property taxes on buildings owned by India for diplomatic purposes, taxes that India believed it was not obligated to pay under international norms.[111] Then, by the functioning of a purely local law, the City converted these tax debts into liens, which India believed (and the City confirmed) were unenforceable under international law.[112] There was never a point at which the personal and real obligations converged in a single, voluntary, valid nexus–as was the case of the mortgage in *Chateau*. Therefore, it seems disingenuous of the Court to give the requirement of a "real action" under the Vienna Convention such short shrift by implying there was little functional difference between the two.[113]

When analyzing early precedent concerning the restrictive theory of sovereign immunity, it is helpful to return to the text of the FSIA, which was intended by Congress to clarify principles for the struggling judiciary.[114] In the opening explanation of the Act, the text states that the

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106. *Permanent Mission of India*, 127 S. Ct. at 2359.
107. Vienna Convention, *supra* note 38 § 23, 34.
108. 28 U.S.C.A. § 1605(b) (2006).
109. Chateau Lafayette Apartments v. Meadow Brook Nat'l Bank, 416 F.2d 301, 302-03 (5th Cir. 1969).
110. *Id.* at 305.
111. *Permanent Mission of India*, 127 S. Ct. at 2355.
112. *Id.*
113. *Id.* at 2358.
114. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 488 (1983).

purpose is generally the "interests of justice" and to "protect the rights" of all interested parties.[115] But what follows is a rather drastic change of tone: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned, and their *commercial property* may be levied upon for the satisfaction of judgments rendered against them in connection with their *commercial activities*."[116] The commercial emphasis of the statement of purpose cannot be missed. It is therefore not surprising that early judgments concerning the distinctions between the public and private did not burden themselves with the hair-splitting analysis of diplomacy norms found in the noted case.[117] Instead, courts looked for a general public or governmental purpose (as opposed to a commercial purpose) and granted a wide berth to self-described diplomatic intentions.[118]

V. CONCLUSION

Practically speaking, the noted case changed little in relation to the position of foreign sovereigns and their property interests in the United States. The Supreme Court did not declare the ultimate validity of the New York City property tax structure, ruling only that a court *could* rule upon this issue.[119] The case was then remanded for further proceedings[120]—although some may argue that the Supreme Court had already answered the ultimate question pertaining to the validity of the tax structure under the FSIA by deciding the question of jurisdiction. But, as the City of New York made clear, there are other ways the United States receives tax revenue from foreign sovereigns–some in the form of voluntary compliance and others in the form of decreased foreign aid.[121]

Under an analysis of the restrictive theory of sovereign immunity, the noted case is not necessarily the type of thorny sovereignty issue that plagued earlier courts in the decades after World War II. For example, the case that prompted the Court to reprint *The Tate Letter* in its entirety involved the conflated public and commercial roles of the sovereign

115. 28 U.S.C.A. § 1602 (2006).

116. *Id.* (emphasis added).

117. Republic of Argentina v. City of New York, 250 N.E.2d 698, 698, 704 (N.Y. 1969) (referencing the Ontario High Court, which reasoned that sharp distinctions between commercial and public actions by States ignored the realities of modern diplomacy and therefore property occupied by a foreign sovereign and used for public purposes would not be subject to tax liability).

118. *Id.*

119. *Permanent Mission of India*, 127 S. Ct. at 2358.

120. *Id.*

121. *Id.* at 2355.

under a communist regime.[122] In *Alfred Dunhill of London v. Republic of Cuba*, the Supreme Court was asked to rule on compensation for trademark infringement by exiled Cuban exporters living in the United States after their companies were nationalized under President Fidel Castro and the State continued to use the confiscated U.S. trademarks to market Cuban cigars abroad.[123] Compared to the complex discussions of state sovereignty issues offered by both the majority and dissent, the noted case's reasoning seems simplistic.

The majority's dependence upon property law analysis misses the point.[124] The dissent concedes that this analysis of "burdens" that "run with the land" and the like technically satisfy the text of the FSIA exception.[125] But sovereign immunity has always been a positive grant to the receiving nation, a gift.[126] If Congress had intended an excessively narrow interpretation of the FSIA, it could have worded the grant of immunity in the reverse, saying that foreign nations are subject to U.S. jurisdiction in all cases except specific enumerated situations.

The simplest explanation of the Supreme Court's ruling is not found in any restatement of property law but rather in a change of perspective. The City had tried in earlier appeals to claim that the housing of lower level mission members in a government-owned building *was* commercial activity, a clearer path to a FSIA exception that would allow municipal taxation. It is interesting to note that this bald assertion (which was not supported by the courts) has the same *effect* as stating that lower level diplomatic residences are not exempt under diplomatic immunities, which was supported by the Court. It is unsurprising that the Court chose a jurisdictional interpretation likely resulting in commercial gain while presiding over the U.S. courts at a time when economic predominance is valued over diplomatic cordiality. However, when reflecting on the nature of comity, the Court might do well to remember the humble assertions of Chief Justice Marshall, who advocated reciprocity in a time when the United States' future was not entirely certain.

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122. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).
123. *Id.* at 685.
124. *Permanent Mission of India*, 127 S. Ct. at 2356.
125. *Id.* at 2359.
126. Schooner Exchange v. McFaddon, 7 Cranch 116 (1812).

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