No. 06-134

# In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL.,

*Petitioners*,

v.

CITY OF NEW YORK

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals For the Second Circuit**

## BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


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## QUESTION PRESENTED

*Amici* will address the following question:

Whether United States courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976 to declare the validity of a tax lien held by a municipal authority for unpaid property taxes imposed on property owned by a foreign nation.

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amicus* International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them through its Legal Advocacy Program. IMLA has appeared as *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

*Amicus* U.S. Conference of Mayors ("USCM") represents more than 1,100 cities with populations of 30,000 or more. USCM promotes the development of effective urban policy, strengthens federal-city relationships, and creates a forum in which mayors can share ideas and information. It also represents urban interests in litigation and has often appeared as an *amicus curiae* in this Court

The question presented in this case directly affects the operation of local governments because of their significant reliance on property taxation as a source of municipal funding. Because IMLA and the USCM have unique expertise with respect to these issues as well as a strong interest in their

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

appropriate resolution, *amici* submit this brief to assist the Court in the resolution of this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq*., in 1976. The Act advances two principal goals: it aligns United States practice on sovereign immunity with what Congress understood to be the then-prevailing practice among other nations; and it "transfer[s] the determination of sovereign immunity from the executive branch to the judicial branch," thereby ensuring that such decisions are made "on purely legal grounds" and are untainted by political considerations.[2] The only issue in this case is how Section 1605(a)(4) of the Act, which excepts suits involving immovable property owned by foreign states from FSIA's general grant of sovereign immunity, should be construed in light of these goals.

Resolving this question does *not* require the Court to give any formal weight to foreign practice or international law. Nothing in the question at issue or in the judgment of the court below even remotely implies otherwise. Rather, the Second Circuit properly recognized that such sources are relevant only insofar as they provide useful guidance on what Congress expected or intended when it enacted FSIA, since one of the Act's goals was to conform U.S. sovereign immunity standards to then-prevailing international practice. Nor does this case require the Court to defer to the Executive Branch's interpretation of FSIA. A key purpose of the Act was to "eliminate the peculiar and * * * outdated practice of having a political institution, namely, the State Department,

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[2] House Report No. 1487, 94th Cong., 2d. Sess., 7, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter "House Report"].

decide many of these questions of law,"[3] and hence to transform issues of immunity into "pure question[s] of statutory interpretation" that are "well within the province of the Judiciary." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987).

Indeed, if anything warrants deference here, it is the State Department's longstanding view – in the years leading up to FSIA's enactment and beyond – that the immovable property exception provides United States courts jurisdiction to declare the validity of property tax liens. As the United States' *amicus* brief in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985) stated, "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their [property tax] obligations to state and local communities." U.S. *Englewood* Br. 3. That representation, made much closer in time to the passage of FSIA than the United States' submission in this case, was correct.

Relying on appropriate sources of meaning, the identity and relative importance of which has been recognized repeatedly by the Court in this context, it is clear that the judgment below should be affirmed.

I. First in importance is the text of FSIA itself. See, *e.g.*, *Mallard v. United States Dist. Court*, 490 U.S. 296, 300-01 (1989). The language of Section 1605(a)(4) contains no limitation, denying immunity "in any case * * * in which * * * rights in immovable property are in issue." This text does not hinge anything on *whose* "rights" must be "at issue." In this

[3] Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2nd Sess., (June 2 and 4, 1976), 25, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter Hearings (1976)].

case, both New York City (through its statutory tax lien on the properties) and the nations of India and Mongolia (through their ownership of the property) have rights at stake in the litigation. As a result, this suit falls within the plain terms of FSIA's immovable property exception to sovereign immunity and should proceed to a hearing on the merits.

II. Next in importance are contemporaneous materials relied upon by Congress when it enacted FSIA. See, *e.g.*, *Asociation de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521-22 (D.C. Cir. 1984) (Scalia, J.) (utilizing contemporaneous sources available to Congress, including treatises, international practice, and domestic U.S. materials, to help interpret Section 1605(a)(4)). At the time, Congress anticipated that FSIA would bring the United States into line with international law and practice; it also had a specific understanding concerning the meaning and scope of the immovable property exception. Both sets of expectations are relevant to this case.

Four key facts emerge from the legislative materials. First is the universal and well-documented understanding that FSIA was understood to embrace the restrictive theory of sovereign immunity, both generally and with respect to the immovable property exception. Second is the broad understanding of Section 1605(a)(4) held both by Congress and by the State and Justice Departments, whose officials not only drafted the Act but also were relied upon by Congress for their considerable knowledge of the state of existing international practice. Third is evidence showing that Congress believed FSIA would mirror the European Convention on State Immunity ("EC"), which also contains a broad immovable property exception. And fourth are the State Department's explicit indications to Congress that FSIA would be consistent with existing U.S. practice, which did not recognize general immunity for foreign states against suits involving liens for unpaid property taxes.

III. The final source of evidence bearing on the original meaning of FSIA is the subsequent practice of the United State and other nations. While that practice post-dates FSIA's enactment, it nonetheless sheds light on how the Act was originally understood because there is no evidence suggesting that the fundamental understanding of the Act, or of the international law of sovereign immunity more generally, has changed since 1976.

Domestic and international practice since 1976 clearly reflect the historical *continuity* of providing United States courts jurisdiction to enforce the tax obligations of foreign states. For example, the Third Restatement of U.S. Foreign Relations not only makes clear that FSIA's immovable property exception extends to suits for unpaid taxes, but also confirms that this result follows from the restrictive theory of sovereign immunity, which the Act was intended to broadly codify. Likewise, in *Englewood*, the first major case addressing the precise issue presented here, the United States' *amicus* brief argued that the *original understanding* of FSIA did not preclude local municipalities from suing foreign states for failure to pay property taxes. Other post-enactment evidence consistent with this understanding includes recent congressional statutes and the acceptance of a broad immovable property exception in numerous foreign statutes and international covenants.

## ARGUMENT

### I. THE TEXT OF FSIA PLAINLY ENCOMPASSES SUITS TO DETERMINE THE VALIDITY OF TAX LIENS.

The text is the starting point for interpreting FSIA's immovable property exception. Section 1605(a)(4) provides that a foreign state shall not be immune in "any case in which rights in immovable property situated in the United States are in issue." Because the text does not modify or condition the "rights" that must be in issue, the exception by its plain terms

encompasses all rights held by *anyone* in the disputed property – including those held by municipalities against properties with outstanding tax liabilities.

In common parlance, disputes involving tax liens involve just such rights in immovable property – and were understood to do so at the time of FSIA's enactment. In general, a lien is a "legal right or interest[] * * * in another's property." Black's Law Dictionary 941 (8th ed. 1999). State law defines the specific contours of rights in property, and in New York a lien on realty is defined as "a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied." 75 N.Y. Jur.2d, *Liens* § 5, at 138. Like other encumbrances on real property, New York City tax liens run with the land and are perpetual in duration. New York City Charter § 1519(2). And as respondent convincingly shows, tax liens are widely recognized by courts, legislatures, and commentators as rights in real property.

The United States used to agree that there is "substantial authority to support the proposition that a tax lien * * * conveys upon its holder an interest in the land which is subject to the lien." U.S. *Englewood* Br. 11; see *ibid.* (stating that a lien constitutes an interest in the debtor's land that deserves substantial protection) (citing Powell & Rohan, *The Law of Real Property* § 477 (1954)). In its *Englewood* filing, the United States accordingly argued that a "narrow definition of rights" excluding an interest in tax liens – the definition for which it now contends – was "inconsistent with principles of real property law, at least with respect to tax liens," relying for this proposition on multiple authorities that existed prior to the passage of FSIA in 1976.

The United States used these contemporaneous authorities to highlight four examples where "courts and legislatures have held that liens are rights in the property which is subject to the lien." U.S. *Englewood* Br. 11. First, the holder of a tax lien may bring an action against the taxpayer to enjoin

"waste" of the land, which typically is a suit that may be brought only by parties with a right or interest in the property. *Id.* at 12 (citing 85 C.J.S. *Taxation* § 901 (1955)). Second, "holders of tax liens are entitled to compensation when the government exercises its power of eminent domain and condemns the underlying property." *Ibid.* (citing 29A C.J.S. *Eminent Domain* § 200 (1955)). Third, "a tax lien is not extinguished when a delinquent taxpayer sells the land to innocent third parties." *Ibid.* (citing *Roby v. Baker*, 432 N.Y.S.2d 917 (3d Dept. 1980)). And fourth, the Uniform Commercial Code "implicitly recognized that liens are property interests in the property to which the lien is attached," because under the U.C.C.'s definition of the word "purchase," "acquisition of a lien creates an interest in the underlying property." *Id.* at 12-13.

The United States was right then and is wrong now: its cramped new reading of FSIA's language – which maintains that the immovable property exception is limited to the adjudications of the *foreign sovereign's* right to title, possession, or ownership – finds no support in the text. On this point, it is instructive to look at the "rights" language of the EC's immovable property exception, which expressly *does* abrogate immunity only when the *foreign sovereign's* property rights or obligations are in issue. Article 9 of the EC provides: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to – *its* rights or interests in, or *its* use or possession of, immovable property; or *its* obligations arising out of *its* rights or interests in, or use or possession of, immovable property." EC, Art. 9 (emphasis added). In contrast, the use of the word "its" to modify rights in property is conspicuously absent from FSIA. That Congress was aware of and chose not to replicate the EC's language indicates a desire to make

FSIA's immovable property exception apply whenever rights, in general, are in issue.[4]

Therefore, the appropriate inference from the plain text of FSIA is that Congress intended to let United States courts adjudicate cases whenever either party to the litigation possesses a right in immovable property located in the United States. Because Congress understood from contemporaneous law and practice that tax liens were rights in property, and because FSIA does not explicitly exempt tax liens from the immovable property exception, there is no immunity with respect to tax disputes.

## II. CONGRESS ENACTED FSIA RELYING ON CONTEMPORANEOUS MATERIALS MAKING CLEAR THAT THE IMMOVABLE PROPERTY EXCEPTION INCLUDES DISPUTES OVER PROPERTY TAXES.

The plain meaning of FSIA's text is confirmed by the legislative background. To the extent that they were available for congressional inspection – and were explicitly presented to Congress during the drafting process – materials bearing on prevailing international practice furnish powerful evidence of congressional intent, given Congress's manifest goal to conform U.S. sovereign immunity law with international practice. See *Reclamantes*, 735 F.2d at 1521 (Scalia, J.).

The Court should place particular weight on representations that the State and Justice Departments made to Con-

[4] Congress' omission of the limiting term "its" from FSIA made it unnecessary for Congress to borrow the EC's "obligations" language. In FSIA, a separate obligations prong would have been superfluous because in cases where a foreign sovereign has obligations arising out of its ownership of property (such as tax liability), another party (such as the taxing authority) necessarily has attendant rights in that property, sufficient to provide jurisdiction under FSIA.

gress on this issue. Understandably in need of expert guidance on how to bring the United States into conformity with international law and practice, Congress consulted with and placed great reliance on the Executive Branch – "the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Co*., 299 U.S. 304, 320 (1936). Indeed, the Departments of State and Justice played a key role in drafting FSIA, and furnished the initial version of the explanatory section-by-section commentary contained in the House and Senate Reports.[5] In addition, senior State and Justice Department officials twice testified before Congress – once in 1973 when the initial version of FSIA was first proposed, and again in 1976 after an amended version was re-introduced – to explain the meaning of specific provisions and the ways in which these provisions fit into the international legal regime. Hearings (1973) at 14-33; Hearings (1976) at 24-54.

The representations made by the Executive Branch and other contemporaneous materials bearing on international practice provide powerful support for the conclusion, evidenced in the statutory text, that Section 1605(a)(4) gives courts jurisdiction to determine the validity of tax liens on property owned by a foreign state.

[5] Hearing before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., (June 7, 1973), 33-48, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter "Hearings (1973)"]. See also House Report at 6-33.

### A. A Fundamental Goal Of FSIA Was To Codify The "Restrictive" Theory Of Sovereign Immunity, Which Denies Immunity In Cases Involving "Private" Acts Such As The Ownership Of Real Property.

There is no doubt that FSIA was passed in large part to codify the "restrictive" theory of sovereign immunity, which permits lawsuits in cases arising from a state's "private" acts.[6] And it is undisputed that ownership of non-diplomatic property is an example of such a private act. Given that the taxes at issue here were assessed on property used as private housing for staff-level employees – and not for the public purpose of maintaining an embassy or consulate, or housing the head of mission, as stipulated by the Vienna Convention[7] – the restrictive theory allows jurisdiction to be exercised in this case.[8]

The United States tries to avoid this conclusion by arguing that the immovable property exception pre-dates the restrictive theory, and hence should be read against the background of the absolute theory of sovereign immunity that prevailed prior to the Tate Letter. U.S. Br. 6, 9-11. Under this approach, the United States maintains, immunity should be denied only when there is a "necessity" that a sovereign "be able to determine all issues relating to the title and possession

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[6] See House Report 7-10, 14, 45; Hearings (1976) 25-27, 31.

[7] See Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (exempting states from taxes on the premises of the mission, defined as the parts of buildings used for the purposes of the mission, including the residence of the head of mission).

[8] To the extent there is a dispute here about whether the property at issue is tax-exempt diplomatic property, it should be resolved in the merits stage of the proceeding, under the standards established by the Vienna Convention. Cf. *Lance* v. *Coffman*, 127 S. Ct. 1194, 1196 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits").

of property within its realm." *Id*. at 6. The United States concludes that the absence of pre-FSIA suits adjudicating tax claims demonstrates that there is no such "necessity" for domestic courts to adjudicate suits for local property taxes. *Ibid*.

This novel theory has perverse implications; although the reasons for waiving immunity as to disputes involving real property were sufficiently compelling that they were recognized even when absolute foreign sovereign immunity otherwise prevailed, the United States now says that real property disputes should be viewed against the background of a uniquely *broad* background understanding of immunity. This approach finds no support in the text or legislative history of FSIA. Nowhere in the Act itself, the House or Senate reports, or the testimony of senior State and Justice Department officials is it suggested that FSIA's immovable property exception seeks to codify the understanding of the real property exception that prevailed under the outdated "absolute" theory, instead of the more modern "restrictive" approach to immunity.

On the contrary, the legislative materials show that Congress understood *all* provisions of FSIA to embrace the restrictive theory. As Bruno Ristau, Chief of the Foreign Litigation Section of the Justice Department's Civil Division, testified before Congress, "[t]he [FSIA] is designed to codify as a matter of Federal law the restrictive theory of sovereign immunity, and thus put to rest once and for all the question as to what doctrine of sovereign immunity the United States follows." Hearings (1976) at 31. And as State Department Legal Adviser Monroe Leigh further made clear, the "principles of international law" constituting the restrictive theory "are embodied in sections 1604 through 1607" – including, of course, the very Section 1605(a)(4) now at issue here. Hearings (1976) at 27.

In light of this contemporaneous evidence, there is no reason to accept the United States' contention that, unlike the

rest of FSIA, Section 1605(a)(4) should be read as though the rule of absolute immunity still prevailed. Such a reading flies in the face of the Act's central purpose – to formally break from the traditional approach and curtail state reliance on immunity in cases arising from private acts.

Moreover, even if the United States is right that the immovable property exception should be construed in accordance with the absolute theory, its conclusion is incorrect because it misstates the broad application of the real property exception that was applied even during the period when absolute immunity prevailed. Even at the time, as described in the Tate Letter, the exception was thought generally to allow suit "*with respect* to real property (diplomatic and perhaps consular property excepted)." House Report at 20 (emphasis added).[9] That understanding of the pre-Tate Letter real property exception, which was stated in terms broad enough to reach suits involving tax liens (suits that surely are "with respect" to real property) and which was familiar to Congress in 1976, cannot be squared with the United States' current position.

[9] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). Further support for this understanding of the absolute theory can be found in a study commissioned by the State Department – and endorsed by its Legal Adviser – in 1963. See Joseph S. Sweeney, The International Law of Sovereign Immunity, cover page and 1, U.S. Department of State, Bureau of Intelligence and Research (October 1963).

### B. Based on Representations By The Executive Branch, Congress Expected The Immovable Property Exception To Apply To Litigation "Relating To" Or "With Respect To" Immovable Property, Including Tax Obligations.

In both 1973 and 1976, officials from the State and Justice Departments made representations to Congress about the prevailing norms of international practice and suggested legislative language for FSIA's immovable property exception to reflect that practice. These representations strongly suggest that FSIA provides U.S. courts jurisdiction to determine the validity of tax liens on such property owned by foreign states.

In 1973, Secretary of State William P. Rogers and Attorney General Richard G. Kleindeist sent Congress an initial draft of FSIA with an immovable property exception identical to the final text of Section 1605(a)(4) enacted three years later. Hearings (1973) at 36. Along with the draft, Rogers and Kleindeist attached a section-by-section commentary giving interpretive guidance on the meaning of each provision. According to the commentary, Section 1605(a)(4) reaches "litigation *relating to* immovables and to the property of decedents." Hearings (1973) at 41 (emphasis added). The commentary went on to note that "a foreign state cannot deny to the local state the right to adjudicate on questions of ownership, *rent, servitudes, and other similar matters*, as long as the foreign state's possession of the premises is not disturbed." *Ibid.* (emphasis added). These broad formulations would appear to describe actions to establish the validity of tax liens on immovable property.

Testifying on behalf of the bill in 1973, State Department Acting Legal Adviser Charles Brower used similar language, confirming the broad scope of Section 1605(a)(4). He declared that the immovable property exception permitted litigation "against a foreign state *relating to* * * * rights in

immovable property situated in the United States." Hearings (1973) at 21. He went on to explain that "this is a pretty clear exception for estate and *real estate matters* in this country, in keeping with the law at the present time." *Ibid.* (emphasis added). Brower gave no indication that the exception applied only to the rights of foreign states or that the assessment of a property tax was not included within the general category of "real estate matters."

The House Report accompanying the final version of FSIA in 1976 endorsed this broad approach. The Report explains that Section 1605(a)(4) "denies immunity in litigation *relating to* rights in real estate * * * located in the United States." House Report at 20 (emphasis added). It goes on to note that, in accordance with the Tate Letter of 1952, "sovereign immunity should not be granted in actions *with respect* to real property, diplomatic and consular property excepted * * * . It does not matter whether a particular piece of property is used for commercial or public purposes." *Ibid.* (emphasis added). Moreover, in its discussion of the immovable property exception and its relationship to the Vienna Convention, the 1976 House Report reflected the Executive Branch commentary, noting that "a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." House Report at 20.

This review of the contemporaneous sources shows that the discussion of Section 1605(a)(4) prior to FSIA's passage in 1976 uniformly endorsed the broad scope of the immovable property exception to sovereign immunity. Indeed, each of the formulations used by the House Report to explain the scope of that exception – "litigation relating to rights in real estate," "actions with respect to real property," the right of courts "to adjudicate questions of ownership, rent, servitudes, and similar matters" – is expansive enough to include disputes regarding tax liens and is significantly broader than the

reading now offered by the United States, which would limit the immovable property exception to suits concerning only "ownership, use, or possession." U.S. Br. 8. Such a construction would narrow the exception's scope well beyond the general understanding that prevailed at the time FSIA was enacted.

### C. The Executive Branch Made Clear To Congress That FSIA Was Consistent With International And Domestic Practice.

#### *1. Congress Understood FSIA To Be Consistent With The European Convention, Which Contains A Similarly Broad Immovable Property Exception.*

There is no dispute that one of Congress's principal goals in drafting FSIA was to align the United States' practice on sovereign immunity with that of other states. At the time FSIA was under consideration, the most ambitious international attempt to generate consensus on the law of sovereign immunity was the European Convention, which was completed in the years immediately preceding passage of FSIA. References to the EC in FSIA legislative materials indicate that both Congress and the Executive Branch believed the Act to be fully consistent and harmonious with the EC.[10] That is significant, because the EC strongly supports the conclusion that disputes concerning tax liens are permissible under FSIA.

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[10] See Hearings (1973) at 18 (testimony by State Department Acting Legal Adviser Charles Brower, discussing the general intent of FSIA's drafters to "conform fairly closely" to "accepted international standards" such as the EC); Hearings (1976) at 37 (Congressman George Danielson asked whether there was "any inconsistency" between the EC and the proposed FSIA, and Monroe Leigh, State Department Legal Adviser, replied: "[i]n general terms, no.").

As we note above, the EC waives immunity not only with respect to suits concerning a state's rights in property, but also when the suit concerns obligations arising out of state ownership of property. EC, Art. 9. The Explanatory Report to Article 9 notes that the terms "rights, use and possession" in the immovable property exception "must be interpreted broadly." Explanatory Report of the European Convention on State Immunity, ETS No. 74 ("Explanatory Report"), ¶ 44.[11] This understanding, with its express reference to state obligations, is flatly inconsistent with petitioners' and the United States' submission that the real property exception is generally understood to reach only disputes concerning a sovereign's rights to title or possession of property.

Petitioners and the United States seek to escape this conclusion by observing that the EC provides, in Article 29, that the Convention does not cover proceedings concerning "customs duties, taxes or penalties." U.S. Br. 28-29. But the United States draws precisely the wrong conclusion from this limitation. Article 29 does *not* give states immunity in tax disputes, as the United States implies. See U.S. Br. 19 n.15 (EC "does not permit adjudication of tax claims"); see also *id*. at 28-29 (EC "do[es] not abrogate immunity in cases to recover property taxes imposed on – or to declare a tax lien on – foreign governmental property"). Rather, Article 29 ensures that the EC neither grants nor denies immunity in tax cases; it limits *both* the broad grant of state immunity of Article 15 and the immovable property exception to that grant of immunity stipulated in Article 9.

Unlike FSIA, the EC is limited to issues of private law. Treatment of customs duties, taxes, penalties and fines was

[11] The Explanatory Report was prepared by an expert committee and submitted to the Committee of Ministers of the Council of Europe. It was intended to provide useful but non-authoritative guidance as to how the Convention should be interpreted. See Explanatory Report, ¶ II.

omitted because, in many countries, such matters "d[id] not fall exclusively under public law or because the dividing line between public and private law [was] ill-defined or non-existent." Explanatory Report, ¶ 113. Because the EC was "essentially concerned with private law disputes between individuals and States," the drafters wanted to ensure that taxation disputes would not be drawn into Article 9's broad immovable property exception. See *ibid.* (stating that without Article 29, "Article 9 in particular might otherwise have been applicable" and waived immunity as to tax disputes).

It is important to realize, however, that Article 29 applies just as much to the general grant of immunity contained in Article 15 of the EC. Hence, the provision removes treatment of tax disputes from the Convention *altogether*, leaving such disputes open to "general rules of law." See Explanatory Report, ¶ 113. The EC thus does not take a position one way or the other on the issue of sovereign immunity for tax disputes, and member states of the Council of Europe may or may not be immune, depending upon the particular laws of each member country. This arrangement is workable because the EC supplements the laws of its member states; as background law, it leaves certain questions open to determination by individual States.

By contrast, FSIA covers the entire field of sovereign immunity law, and hence provides the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states." House Report at 12. The Court has stated its understanding of the Act in similar terms. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities"). And although Congress included in FSIA an immovable property exception as broad as the one in the EC, it chose *not* to limit that exception with language like that in the EC's Article 29. Because the EC's Article 9

would have covered tax liens without Article 29's specific exemption, and because Congress did not include such a public-law exemption to its equally broad immovable property exception, the clear inference is that Congress intended to give United States courts jurisdiction over such disputes.

***2. The State Department Expressly Advised Congress That Existing U.S. Practice Did Not Grant Sovereign Immunity In Cases Involving Liens For Unpaid Property Taxes.***

Other materials before Congress at the time it enacted FSIA point to the same conclusion. During Congress's consideration of the initial version of FSIA in 1973, the Executive Branch indicated that its practice was not to grant immunity to foreign states involved in suits for unpaid property taxes. Given Congress's understandable reliance on the Executive Branch to explain domestic application of sovereign immunity principles and its consequences for FSIA, this representation strongly supports the inference that Congress expected Section 1605(a)(4) to provide jurisdiction in cases like this one.

The representation occurred in response to a specific inquiry from Congress on the State Department's record of granting sovereign immunity. Acting Legal Adviser Brower agreed to provide a subcommittee of the House Judiciary Committee with a detailed record of foreign requests for immunity, along with the formal responses given to those requests. Hearings (1973) at 27. In a subsequent letter, Brower attached a list of requests received since 1960, annotating each to indicate how the Department had responded. *Id*. at 49-51.

In that letter, the State Department characterized *City of New Rochelle* v. *Republic of Ghana, Republic of Indonesia*, and *Republic of Liberia*, 255 N.Y.S.2d 178 (County Ct. 1964) – the only case involving suits against foreign states over unpaid taxes on immovable property – as one in which

"no suggestion of immunity was made." Hearings (1973) at 49, 50. In *New Rochelle*, Ghana, Indonesia, and Liberia asked the State Department to intervene to block local governments from foreclosing on properties being used by their respective Permanent Representatives to the United Nations. Their requests to the State Department and their filings in court argued that U.S. courts lacked jurisdiction to hear the case.

The State Department responded that the real property used by the missions was subject to tax, but that immunity nevertheless was appropriate on the narrow grounds that the subject property was being used as the residence of the ambassador to the United Nations and that the city was seeking to foreclose on the property.[12] In advancing this narrow ground for precluding suit, the State Department did *not* endorse the theory, advanced by petitioners and the United States in this case, that foreign states are immune from *all* suits over liens for unpaid property taxes; if that had been the State Department's view, it would not have focused on whether the property had been used to house the U.N. Ambassador or was subject to attachment. The understanding that property tax disputes generally *may* be adjudicated when the property is subject to tax is, presumably, why the State Department informed Congress at the time of FSIA's enactment that the *New Rochelle* case was one in which "no suggestion of immunity" was made. Hearings (1973) at 49, 50.

The court's decision in *New Rochelle* also lends support to the view that there was no blanket state immunity from suits over property taxation in the years before FSIA. After

[12] State Department Note, No. 44 (June 8, 1964), Michael Sandler *et al.*, eds., Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, reprinted in John A. Boyd, Digest of United States Practice in International Law 1977, 1050 (Jan. 1979). See Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (exempting states from taxes on the premises of the mission, defined to include the residence of the head of mission).

hearing the requests of the foreign states and State Department to dismiss the case, the *New Rochelle* court unambiguously stated that it had the authority to assert jurisdiction. "This court is of the opinion that it *has* jurisdiction of the real property at issue," it declared, "and the question it is considering is whether it will exercise its jurisdiction in these particular proceedings under all of the circumstances." *New Rochelle*, 255 N.Y.S.2d at 179. Ultimately, the *New Rochelle* court declined to exercise jurisdiction so as to avoid "embarrass[ing] the executive arm in its conduct of foreign affairs." *Id*. at 180. In the process, the court cited other decisions to support its two key propositions – that courts indeed possess jurisdiction to hear such cases, and that courts should decline to do so, at the request of the Executive Branch, to avoid interfering with the U.S. government's conduct of international relations. *Id*. at 179-80; see, *e.g.*, *Weilamann* v. *Chase Manhattan Bank*, 192 N.Y.S.2d 469, 471 (Sup. Ct. N.Y. 1959).

This background has a significant bearing on Congress' understanding of the real property exception at the time of FSIA's enactment. In the most directly relevant judicial proceeding, the court concluded that it had jurisdiction to resolve a tax dispute, ultimately declining to do so on narrow grounds not applicable here. And the State Department described the case to Congress as one in which immunity was not recommended. When Congress sought to codify prevailing practice in FSIA, it accordingly had every reason to believe that sovereign immunity did not prevent adjudication of tax disputes involving nondiplomatic property.

## III. POST-ENACTMENT AND CONTEMPORARY PRACTICE SUPPORTS THE INFERENCE THAT FSIA WOULD PERMIT SUITS TO DETERMINE THE VALIDITY OF TAX LIENS.

Although FSIA was enacted in 1976, subsequent practice nonetheless also is probative of Congress' original understanding of the Act. In the absence of a clearly demarcated departure from past practice, it is reasonable to assume

that post-1976 international practice tracks the pre-FSIA understanding that Congress meant to endorse. Against that background, four discrete sources of post-enactment evidence support the inference that Congress intended to allow jurisdiction in cases involving the validity of property tax liens: the Third Restatement of Foreign Relations Law, subsequent international law and practice in the field of sovereign immunity, congressional reliance on judicial determinations concerning unpaid property taxes owed by foreign states, and the State Department's own embrace of a broad interpretation of the immovable property exception in post-FSIA litigation.

### A. The Third Restatement Makes Clear That Foreign States Are Not Immune From Suits For Unpaid Property Taxes.

The Third Restatement of Foreign Relations Law of the United States is one of the most probative sources of Congress's intent to enact a broad immovable property exception to sovereign immunity. In November 1977, the drafting council began the task of revising the Second Restatement. In laying out its agenda for modifying the provisions on jurisdictional immunities, the council noted that FSIA had "superseded the decisional foundation for the present text," thereby requiring the drafters "to take account of this Act, as well as of such developments as the European Convention on State Immunity." American Law Institute, Proposed Revision and Expansion of the Restatement of the Foreign Relations Law of the United States, Background and Description of the Project, 2, 6 (Nov. 1977). The Third Restatement thus was *premised* on FSIA: "The Foreign Sovereign Immunities Act is law of the United States. Much of it codifies and applies international law as the United States views it * * * . This Restatement adopts the Act as the basis for rules of United States law." Restatement (Third) of Foreign Relations Law of the United States ("Third Restatement") § 395 (1986).

Explicitly noting the source of its text as Section 1605(4), the Third Restatement makes clear that "a state is not immune from the jurisdiction of the courts of another state with respect to claims * * * to immovable property in the state of the forum." Third Restatement, § 455(1)(c). Directly addressing the question at issue here, it further explains that ownership

> by a foreign state does not detract from the desirability of adjudicating controversies in local courts. Premises used for an embassy, consulate, or other diplomatic mission come under this rule, so that controversies relating to rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, taxes, and other fees concerning such premises are subject to adjudication in the local courts.

*Id*., § 455 comment b (1986). The United States seeks to minimize this language on the ground that the Third Restatement is "'controversial.'" U.S. Br. 12 n.8 (citation omitted). But this is a surprising suggestion. Members of the Restatement's drafting council included Ruth Bader Ginsburg and Henry J. Friendly. And the language concerning the immovable property exception changed little in the numerous drafts, with the authors noting shortly before the Third Restatement was published that the text on sovereign immunity had "evoked little debate" among its renowned membership of judges, international law scholars, and practitioners. Tentative Draft No. 6, Volume 1, at 2, April 12, 1985.[13] The

[13] In addition, the Third Restatement makes clear that it confirms the principles articulated in the Second Restatement, published in 1965 prior to the passage of FSIA: "The previous Restatement reflected the restrictive theory, and § 451 of this Restatement setting forth the basic rule is consistent with §§ 65(1), 68, and 69 of the previous Restatement." Third Restatement § 396.

Third Restatement's view, derived from a close analysis of FSIA, is due considerable weight.

### B. Since FSIA's Enactment, Foreign States and International Organizations Have Construed And Applied The Immovable Property Exception Broadly.

Since the passage of FSIA, foreign states and international organizations have broadly interpreted the immovable property exception in clarifying and applying the law of sovereign immunity. Although relatively few court decisions bearing on the precise question of jurisdiction over property tax liens exist because most countries choose to honor their obligations to the nation in which the property is located,[14] a number of states have enacted domestic statutes codifying the law of sovereign immunity as it relates to real property. In addition, there have been several attempts by international organizations and legal scholars to draw up agreements defining the scope of sovereign immunity. While few of these proposals have been enacted into law, together with the statutes they paint a picture of international practice that supports a broad interpretation of the immovable property exception encompassing suits against foreign states over property tax liens.

The most important international effort to codify the law of sovereign immunity since FSIA has been the U.N. Convention on Jurisdictional Immunities of States and Their Property ("U.N. Convention"). The drafters of this Conven-

[14] In the United States, the closest case on point is *Reclamantes*, which offered the "first and most comprehensive" opinion to interpret the scope of FSIA's immovable property exception. Pet. App. 18. While not addressing the tax issue specifically, then-Judge Scalia indicated "in dicta that a broad range of property interests (including a security interest) can satisfy the exception." Pet. App. 20. The breadth of this reading suggests that the exception would include suits to establish the validity of tax liens.

tion modeled its broad immovable property exception on the EC and FSIA, applying it to disputes relating to rights in, or obligations arising out of an interest in, immovable property. See Stephen McCaffrey, *Current Development: The Thirty-Fifth Session of the International Law Commission*, 78 A.J.I.L. 457, 465 (1984) (noting that Article 13 of the U.N. Convention embodies the exception to state immunity that is contained in section 1605(a) of FSIA and Article 9 of the EC). As with the EC, the reference to "right or interest" in the UN's immovable property exception was intended to have a broad reach. See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 203 n.53 (2005).

To be sure, as with the EC, there is some evidence from the negotiating history that the U.N. Convention's immovable property exception was not meant to cover tax disputes, instead leaving immunity over such suits to be determined by other sources of law. The drafters of the U.N. Convention wanted to avoid comment on tax suits because they did not intend the Convention to address state-to-state relations at all. See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, at 21-25, Art. 17, U.N. Doc. A/CH.4/376 (1984) (Art. 17). But because Congress did not intend to so limit FSIA, the breadth of the U.N. Convention's approach to the immovable property exception generally supports the view that the exception is not restricted to disputes concerning the sovereign's right to title or possession.

Several states have also enacted domestic statutes setting forth the scope of sovereign immunity. For example, in 1985 Australia passed its Foreign States Immunities Act.[15] The Act itself, together with subsequently issued regulations, explicitly makes clear that a foreign state has no immunity from

[15]No. 196 (1985), *reprinted in* Andrew Dickinson *et al*., eds., State Immunity: Selected Materials and Commentary 469-87 (2004).

proceedings concerning obligations "imposed on it * * * with respect to taxation."[16] Argentina's 1995 law on Immunity of Foreign States from the Jurisdiction of Argentinean Courts is also quite broad, making clear that foreign states "may not invoke jurisdictional immunity * * * in the event of actions over real estate located in Argentina."[17]

Of the other states that have passed domestic sovereign immunity statutes, most have adopted the approach favored by the European Convention. The United Kingdom[18], Pakistan[19], and Singapore,[20] for example, all have domestic stat-

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[16] *Id*. at 478; Foreign States Immunities Regulation, No. 77 (as amended) (1987) (Austl.), available at: http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/87C39DB5671D39CCCA256F8F00181874/$file/1996B00775.pdf.

[17] Immunity of Foreign States from the Jurisdiction of Argentinean Courts, Law No. 24,488 (1995) (Arg.), reprinted in Andrew Dickinson *et al*., *supra*, at 465.

[18] State Immunity Act (1978) (U.K.), reprinted with commentary in Andrew Dickinson *et al.*, *supra*, at 329-442. See Section 6 (state is not immune "as respects proceedings relating to * * * any interest of the state in, or its possession or use of, immovable property in the United Kingdom; or * * * any obligation of the State arising out of its interest in, or its possession or use of, any such property"); Section 11 (state is not immune "as respects proceedings relating to its liability for * * * rates in respect of premises occupied by it for commercial purposes"); and Section 16 (Act "does not apply to proceedings relating to taxation other than those mentioned in section 11 above"). *Id*. at 372, 383, 414-15.

[19] State Immunity Ordinance No. VI (1981) (Pak.), reprinted in Andrew Dickinson *et al*., *supra*, at 496-503. See Articles 7, 12, and 17 (statutory language virtually identical to UK State Immunity Act's Sections 6, 11, and 16 quoted *supra* note 18). *Id*. at 498, 500, 503.

[20] State Immunity Act, Ch. 313 (revised version 1985) (Sing.), reprinted in Andrew Dickinson *et al*., *supra*, at 504-12. See Articles 8, 13, and 19 (statutory language virtually identical to UK State

utes combining broad immovable property exceptions to immunity, explicitly applicable to taxes on property used in commerce, with narrow statements of non-applicability to other matters of taxation. This approach stems from the desire, as the commentary on the U.K. law (on which the others were modeled) makes clear, to confine the scope of the immunity statute – including both the initial grant of sovereign immunity and the exceptions to such immunity – to suits between private individuals and foreign governments.

In addition to domestic statutes enacted after FSIA, a number of international organizations also have prepared draft multilateral agreements on sovereign immunity. While none of these drafts has been enacted into law, they provide a useful window into contemporary international understanding concerning the scope of the immovable property exception. In each case, the exception is broad enough to encompass suits arising from the failure of a state to pay property taxes.

The clearest example of such a provision is the Resolution of L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement.[21] Article 2(2)(b) of the Resolution makes clear that the courts of the forum state "are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign (State) * * * is a party," including relationships of "ownership, possession, and use of property." *Id*. at 207. Later, Article 2(2)(i) provides that domestic courts "are competent in respect of proceedings relating to fiscal li-

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Immunity Act's Sections 6, 11, and 16 quoted *supra* note 18). *Id*. at 507, 509, 512.

[21] Resolution of L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in relation to Questions of Jurisdiction and Enforcement (Basle, 2 September 1991), reprinted in Andrew Dickinson *et al*., *supra*, at 206-211.

abilities, income tax, customs duties * * * and similar impositions provided that such liabilities are the normal concomitant [of] commercial and other legal relationships in the context of the local legal system." *Id*. at 208.

Similarly, the Inter-American Draft Convention on the Jurisdictional Immunity of States contains broad language explicitly barring claims of immunity "in actions involving real property" and "in tax matters regarding [commercial] activities * * * for property located in the *forum* State."[22] Likewise, draft articles prepared in 1994 by the International Law Association for a convention on sovereign immunity declared that states were not immune from jurisdiction in instances where "the cause of action relates to * * * [t]he foreign State's rights or interests in, or its possession or use of, immovable property * * * or [o]bligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property."[23] In both cases, the language clearly allows jurisdiction to be exercised in suits over unpaid property taxes. Therefore, laws of foreign states and proposals of international organizations since FSIA's passage further bolster the widely held view that the immovable property exception should be construed broadly to refuse immunity for foreign states involved in tax lien disputes.

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[22] Organization of the American States, Inter-American Draft Convention on Jurisdictional Immunities of States, Articles 5 and 6, reprinted in Andrew Dickinson *et al*., *supra*, at 201-02. The draft was approved by the Inter-American Juridical Committee on January 21, 1983, but never formed the basis of a binding international agreement.

[23] International Law Association Revised Draft Articles for a Convention on State Immunity (Buenos Aires, 14-20 August 1994), Article III(D), *reprinted in* Andrew Dickinson *et al*, *supra*, at 196.

### C. Recent Congressional Appropriations Statutes Show That Congress Still Interprets FSIA To Provide United States Courts Jurisdiction Over Property Tax Suits Against Foreign Nations.

Recent Congressional appropriations statutes offer additional evidence that FSIA provides United States courts with jurisdiction to resolve property tax suits against foreign nations. These statutes penalize states for non-payment of their tax obligations and rely on court decisions to determine the nature of these obligations. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004) (requiring that 110 percent of unpaid property taxes by any country, determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof," be withheld from foreign aid ordinarily provided to the country).

Of course, these statutes long post-date enactment of FSIA and therefore do not bear directly on Congress' intent in 1976. But as the Second Circuit explained, they do reflect the unbroken understanding that FSIA allows suits against foreign states for unpaid taxes. See Pet. App. 11 (emphasizing "Congress's explicit reliance on the courts to adjudicate the property tax liability of foreign governments"). Nothing in the legislative history hints at equivocation regarding Congress's recent decision. See, *e.g.*, Conf. Report, P.L. No. 108-447, 1017.

### D. The United States' *Amicus* Brief In *Englewood* Explicitly States That FSIA Does Not Make Foreign States Immune From Suits For Property Tax Liens.

Finally, one other piece of post-enactment evidence casts considerable light on the meaning of FSIA: the United States' 1985 brief in *Englewood*, which explicitly endorsed

the understanding that Section 1605(a)(4) does not provide immunity for foreign nations involved in property tax disputes. The United States declared in that brief that "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities." U.S. *Englewood* Br. 3. Instead, the United States explained, Congress meant FSIA to codify international law, and "international law and practice * * * encompasses generally all rights and obligations arising out of the ownership, possession or use of real property, including real property taxes." *Id.* at 6. The United States also recognized that "Section 1605(a)(4) was intended to codify the restrictive theory of sovereign immunity as applied to actions with respect to real property" (*ibid.*), implicitly rejecting the novel view – which it now advances – that the provision intended to codify the exception as recognized under the theory of absolute immunity. The United States went on to criticize the lower court's opinion in *Englewood* on the ground that it "would deny jurisdiction in cases which Congress explicitly had intended to make justiciable." *Id.* at 7. And, as we note above, the United States argued that under Section 1605(a)(4), *both* the holder of a tax lien *and* the owner of the property burdened by the lien have "rights in immovable property * * * in issue." U.S. *Englewood* Br. 11.

In a curt footnote to its brief in the instant case, the United States recants its filing in *Englewood*. U.S. Br. 19, n. 15. We agree with the United States that a foolish consistency is the hobgoblin of little minds. But the United States would deserve more credit for its admission of error were it to give a persuasive explanation for its change in position. It says now that its previous filing erred because it overlooked Article 29 of the EC. But as we have explained, its *current* filing also misstates the significance of that provision. The United States likewise says nothing to explain away its prior analysis of settled law showing that a lien establishes a right in property. And it wholly disregards its prior declaration that

"Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities." These statements, made closer in time to enactment of FSIA, got it right.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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