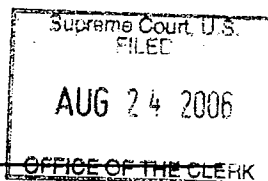


No. 06-134



In the
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE PERMANENT
REPRESENTATIVE OF MONGOLIA TO THE UNITED
NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the exception to sovereign immunity for cases “in which rights in immovable property situated in the United States are in issue,” 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality’s lawsuit seeking to declare the validity of a tax lien placed upon real property owned by a foreign sovereign?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. City of New York v. Permanent Mission of India to the UN at 446 F.3d 365 (2d Cir. 2006) and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1 to App. 24.

The memorandum and order of the United States District Court for the Southern District of New York is reported sub nom. City of New York v. Permanent Mission of India to the UN at 376 F.Supp. 2d 429 (S.D.N.Y. 2005), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 25 to App. 45.

STATEMENT OF THE CASE

Petitioners each own and operate multi-storey properties in midtown Manhattan, in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations, and of the Indian consulate in New York, below the level of head of mission, and their families. The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations, below the level of head of mission, and their families.¹ The City of New York ("the City") has assessed real property taxes on these portions of the property, since 1981 as to Mongolia's building, and since 1991, as to India's building, which taxes have not been paid. The total arrearage continues to grow through the imposition of interest charges and additional yearly tax assessments. As a result, by operation of law, the City holds a tax lien covering both properties.²

¹ The remaining floors of each building, which floors are not the subject of this case, are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence.

² Real property tax liens arise as a matter of law in New York City, pursuant to NYC Administrative Code § 11-301 and New York Real Property Tax Law § 102(21), when municipal real property taxes are unpaid. Such liens encumber the property until they are paid, NYC Administrative Code § 11-301, and may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333.

The City commenced actions against the petitioners pursuant to New York City Administrative Code Title 11,³ seeking to obtain declarations of the validity of the liens and to embody them in judgments, although not to foreclose against the present owners.⁴ The action asserted that petitioners are not immune from liability for the taxes, charges and interest forming the subject-matter of the lien under local, state, federal or international law,⁵ and that

³ The New York City Administrative Code authorizes a proceeding to reduce tax liens to judgment after they are outstanding for one year. NYC Administrative Code §§ 11-354, 11-335.

⁴ The potential for execution under any judgment ultimately rendered in the proceedings is not implicated, since the City has represented in the suit that it is seeking only a judgment establishing the validity of the existing tax liens, and not execution upon the property.

⁵ The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), exempt from real property taxation only so much of foreign-owned real property as is used exclusively for the purposes of maintaining the offices of a United Nations mission or consulate, or the residence of a head of mission. New York State's Real Property Tax Law § 418(1) follows the same formula. Similarly, the State Department has informed foreign governments that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career heads of the consular posts or chiefs of missions to the international organizations." U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004. See also, U.S. Department of State, Diplomatic Note HC-18-93, April 14, 1993; U.S. Department of State, Diplomatic Note HC-06-93, February 17, 1993; U.S. Department of State, Diplomatic Note HC-12-01, April 5, 2001. The State Department's Guidance, at § 7.8, suggests that a broader exception for premises used to house all diplomatic staff is applicable only to embassies and consulates within the Washington, D.C. metropolitan area, subject to reciprocal treatment of similar United States-owned property abroad.

jurisdiction is appropriate under the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602 through 1611. At 28 U.S.C. § 1605(a)(4), the FSIA exempts from the jurisdictional immunity of a foreign state cases "in which . . . rights in immovable property situated in the United States are in issue." At 28 U.S.C. § 1605(a)(2), the FSIA exempts from such immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state."

The cases were removed by petitioners to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(d). Petitioners then moved to dismiss the complaints for lack of subject matter jurisdiction, upon the ground of immunity from suit under § 1604 of the FSIA. The District Court held that it had jurisdiction under the FSIA's immovable property exception, basing its conclusion upon "[t]he international practice that the immovable-property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." App. 44, 376 F.Supp.2d at 439. The District Court relied heavily upon the decision of Scalia, J., in Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which noted that the FSIA's enactment codified the restrictive view of foreign sovereign immunity, and that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local-action rule'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Id. at 1521. The District Court did not reach the merits of the commercial activity argument, and it emphasized that its decision addressed the jurisdictional

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threshold and not the substantive issue of whether the properties are exempt from tax liability. App. 44-45, 376 F.Supp.2d at 439. This interlocutory appeal ensued.

The Court of Appeals for the Second Circuit unanimously affirmed, holding that the immovable property exception of the FSIA confers jurisdiction because “[w]hat is in dispute in this case is the extent of defendants’ obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States.” App. 21, 446 F.3d at 376. Although the City had emphasized, and continues to emphasize, that the rights in issue were embodied in a lien upon the property, the Court held that the right to tax, itself, is a right in immovable property that provides a permissible basis for jurisdiction, and that the Court “would reach the same result had this action been filed purely to obtain a declaratory judgment” regarding the taxable status of the properties. App. 21 n.16, 446 F.3d at 376 n.15. Like the District Court, the Court of Appeals did not reach the commercial activity exception, although the City had emphasized, and continues to emphasize, its applicability as an alternative ground for jurisdiction.⁶

The Court rejected petitioners’ argument “that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the

⁶ The Court, however, noted that as an owner of real estate, a foreign government was acting in a private rather than in a sovereign capacity. App. 9, 446 F.3d at 370, citing Republic of Argentina v. Weltover, 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992). This is the analytical framework of the commercial activity exception, under which the private acts of a foreign sovereign are not immune.

immovable property itself,” App. 7, 446 F.3d at 369. It concluded that the exception should be construed to include any case involving the foreign country's obligations arising directly out of the use of property situated in the United States, in addition to their rights to, interest in, use or possession of such property, App. 17-18, 446 F.3d at 374. Such obligations, the Court noted, are “simply the flip side” of the City’s rights in the property, and the provision is not restricted, as petitioners argued, to “cases where the foreign government's rights in the property are in issue.” App. 8, 446 F. 3d at 369.

The Court based its conclusion upon the plain language of 28 U.S.C. § 1605(a)(4), which does not limit itself to rights of possession or ownership. App. 8, 446 F. 3d at 369. The Court noted, as did the District Court, that “[o]wnership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership . . . while simultaneously disclaiming the obligations associated with them.” App. 16, 446 F.3d at 374. The Court further noted that “at the time that the FSIA was enacted, the New York legislation at issue in this case was already in place,” and that, as disclosed by such case law as Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969), “courts had jurisdiction to hear disputes such as this one.” App. 17 n.12, 446 F.3d at 374 n.11.

The Court, as had this Court in Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), and the District of Columbia Circuit in Reclamantes, 735 F.2d at 1521, also

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examined the FSIA's legislative history,⁷ which made clear that "Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity," which accords immunity "only where a state is acting in a sovereign capacity." App. 9, 446 F.3d at 370. The Court further noted that the "ownership of real estate in a foreign country . . . is not inherently a sovereign act." The Court observed that "the FSIA was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory." App. 12, 446 F.3d at 371.

Before reaching its decision, the Court of Appeals requested the views of the Department of State on whether or not the immovable property exception "should be interpreted to accord with the more detailed version of this provision found in . . . the United Nations Convention on Jurisdictional Immunities of States and their Property, [and . . .] the European Convention on State Immunity," and asked whether "any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception." App. 56-57. The Department of Justice, writing on behalf of the State Department, argued in favor of a narrow interpretation of the immovable property exception, so as to preclude jurisdiction in this case. App. 57-73. It advised that a decision upholding jurisdiction would be controversial within the diplomatic community, that it might result in interference with the operations of United States missions abroad, and that the pendency of the suit had already adversely affected

⁷ H.R. Rep. No. 1487 at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

bilateral relations with an unspecified one of the petitioner governments. App. 74-75. The Court of Appeals “carefully considered . . . the United States’ arguments sounding in public policy” and was “not persuaded.” App. 21, 446 F.3d at 377. The Court also “looked carefully at the United States’ brief statement of potential foreign policy concerns, and found them “not presently to justify a dismissal on foreign policy grounds.” App 22 n.17, 446 F.3d at 377 n.16.

REASONS FOR DENYING THE WRIT

- I. **There Is No Significant Conflict Between the Circuits. The Second Circuit’s Decision Was Consistent With And Built Upon Other Case Law. The Only Apparently Inconsistent Decision Is Twenty-One Years Old And Represents Nothing More Than A Transitional and Superficial Split Between the Circuits.**

Looking at the relevant decisions of other circuit Courts of Appeal, the Second Circuit noted that its holding was “entirely consistent with” the District of Columbia Circuit’s decision in Asociacion de Reclamantes v. United Mexican States, 735 F.2d at 1517, and “indeed builds upon the groundwork it laid.” App. 20, 446 F.3d at 375. The Second Circuit concurred, as well, with “the methodology [Reclamantes] employed (looking at international practice around the time of the FSIA’s enactment).” Id. The Reclamantes Court rejected a claim by the successors in

interest to the recipients of land grants from Mexico who were driven from their land in the period following the Mexican War, and who claimed that Mexico had assumed the responsibility for compensating them for their lost land but had not done so. Reclamantes concluded, as did the Second Circuit here, that the immovable property exception was enacted to codify a real property exception to sovereign immunity recognized by international practice.

Reclamantes held that the claims involved there were not “property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land,” 735 F.2d at 1523, and that the involvement of real property in the suit was “purely of historical interest, having no bearing upon present property interests.” Id. In so holding, Reclamantes placed “rights to payment of money secured by an interest in land” among those rights that fall within the FSIA’s definition of rights in immovable property. Id. Reclamantes cited with approval County Board v. Government of the German Democratic Republic, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978) (reprinted in 17 Int’l Legal Materials 1404 (1978)), in which a county taxing authority sued a foreign sovereign for delinquent real estate taxes, including, as in this case, a “prayer for declaratory judgment that the property in question was subject to the state’s statutory tax lien in favor of the county.” See, 735 F.2d at 1522. The District Court there held that there was jurisdiction to entertain the suit under § 1605(a)(4) of the FSIA.⁸

⁸ Following rendition of a judgment in favor of the County in County Board, the Attorney General, at the request of the Department of State,

Like the District Court here, the Reclamantes court observed that the same considerations that produced the real property exception also underlie the local action rule, which doctrines “are obviously complementary, since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court.” Id. at 1521-1522.⁹

The Second Circuit here also noted that its holding was not inconsistent with other decisions which denied jurisdiction under the immovable property exception, because those disputes “did not directly implicate present real property interests because the plaintiffs sought only money damages and not any adjudication of property rights.” App. 19n, 446 F.3d at 376n.¹⁰

filed another action, which was not challenged under the FSIA, seeking a declaratory judgment that the property was exempt from county tax and seeking an injunction prohibiting further attempts to collect such taxes. In that action, the subject tax assessments were held violative of bilateral international agreements and of customary international law as it applied to the metropolitan area surrounding the nation’s capital. United States v. County of Arlington, 669 F.2d 925, 928 (4th Cir. 1982), cert. denied sub nom. County of Arlington v. United States, 459 U.S. 801, 103 S. Ct. 23, 74 L. Ed. 2d 39 (1982), appeal after remand sub nom. United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983).

⁹ In New York, as elsewhere, actions involving liens are subject to the local action rule. See, e.g., J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R.2d 1261 (1948)

¹⁰ MacArthur Area Citizens Ass’n v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987); and Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002).

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The Court found "unpersuasive," App. 20n-21n, 446 F.3d at 376 n.14, the only apparently contrary decision, that of the Third Circuit Court of Appeals in City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985), though it characterized the case as a denial of jurisdiction upon apparently similar facts. Upon closer examination, Englewood does not present a deep or meaningful split between the circuits.

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The Third Circuit in Englewood only briefly and parenthetically discussed the immovable-property exception to immunity from suit under 1605(a)(4) of the FSIA. Citing Reclamantes, and no other authority, for a proposition that Reclamantes does not support, the Third Circuit characterized the exception as probably having been intended to apply only to title disputes. Accordingly, the Court stated that the immovable property exception "does not apply," 773 F.2d at 36.

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Englewood was decided in 1985, one year after Reclamantes, within ten years of enactment of the FSIA, and over twenty years before this decision. In the interim, international jurisdictional norms have evolved, both through the preparation of draft conventions, and through ongoing interactions between local taxing authorities, the United States, and the United Nations and diplomatic communities.¹¹ This decision and Reclamantes represent a rational continuum, as the Second Circuit noted, and Englewood is not likely to be followed, even within the Third Circuit.

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¹¹ See footnote 5, infra.

In Englewood, “[t]he dispute giving rise to the . . . litigation [arose] out of efforts of the City of Englewood, New Jersey, to tax a parcel of improved real estate purchased by Libya as a residence for its Head of Mission to the United Nations.” 773 F.2d at 32. When the City of Englewood sought a tax increase in the state tax court, Libya sought an exemption from taxation, and the proceeding was removed to the federal courts.¹² The decision in Englewood considered the immunity of Libya’s property from execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B),¹³ which it characterized as “substantially

¹² The Third Circuit noted that, rather than dealing with the matter under the FSIA’s immovable property exception, and “[r]ecognizing . . . that New Jersey law makes no provision for in personam enforcement of liability for real estate taxation, the [District C]ourt turned to the more practical consideration of whether Englewood could execute against the property in an in rem foreclosure of the claimed lien of its tax assessment.” Englewood, 773 F.2d at 34. The District Court held that since the property was used as only a part-time weekend retreat and was not the primary residence of the head of mission, and because it was used for a commercial activity, it was subject to attachment and execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B). Id. The decision that was presented for review in Englewood, therefore, was not premised on the FSIA’s exceptions to immunity from suit.

¹³ Although the Second Circuit here chose not to distinguish Englewood, the different state tax and lien laws governing in Englewood and in this litigation are significant in placing the two litigations in context, as the City argued in the Second Circuit. See, City’s Second Circuit Brief at p. 39. Under New Jersey law, no judicial action is necessary as a precondition to forcing a sale of real property for failure to satisfy a tax lien. New Jersey Stat. § 54:5-19 provides: “When unpaid taxes or any municipal lien, or part thereof, on real property, remains in arrears on the 11th day of the eleventh month in the fiscal year when the same became in arrears, the collector or other officer charged by law in the municipality with that duty, shall . . . enforce the lien by selling the property . . .” In contrast, the New York City Administrative Code, at §§ 11-354 and 11-335, requires judicial authorization for enforcement through execution upon the property.

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parallel” to the sections of the FSLA pertaining to “the general rule of immunity from personal jurisdiction.” 773 F.2d at 35. It stated that “[t]he case for an exception, either to section 1604 or to section 1609 turns . . . on whether,” as the District Court had held, Libya was engaging in a “commercial activity,” 773 F.2d at 36, rather than on the immovable property exception.¹⁴

Given the brevity, superficiality and vintage of the Third Circuit’s discussion, the District Court in this case was correct in noting that “[i]n light of the treatment of the immovable-property exception in Englewood, that case does not offer . . . adequate support to overcome the authority bolstering the City’s position.” App. 41, 376 F. Supp. 2d at 438. In the case’s current posture, it similarly does not present a cognizable conflict between circuits, and thus presents an insufficient basis for review.

¹⁴ The Third Circuit rejected the District Court’s reasoning that the commercial activity exception applied “because the property was acquired by Libya in a commercial transaction between a seller and a buyer,” noting that “[t]he only purpose Libya has in holding the property . . . is for use by the Chief of its Mission to the United Nations,” which it held to be “activity directly related to the purposes of the mission, and as a matter of law such use is not commercial activity.” 773 F.2d at 37.

II. The Court of Appeals Correctly Relied Upon The Language Of The Statute And Its Legislative History To Determine That The Dispute Before The Court Came Within The FSIA's Immovable Property Exception. Petitioners Are Mistaken In Their Characterization Of The Court's Discussion Of International Conventions.

Petitioners take issue with the Second Circuit's conclusion that a dispute concerning the validity of tax liens puts a right in immovable property in issue, and they attack the Court's discussion of international conventions that were adopted or drafted roughly contemporaneously with the enactment of FSIA as an improper basis for the Court's decision. Neither issue provides an appropriate ground for review.

The Court of Appeals did not, as petitioners urge, act improperly in rejecting petitioners' argument that "rights in immovable property" should be read to exclude tax liens. Its analysis began, correctly, with the language of the statute, which, on its face, includes any dispute that directly involves any recognized legal right in immovable property, without being limited to rights to title, possession, use or servitudes.¹⁵ The Court noted that the legislative history is to the same effect.¹⁶ The Court did not, as

¹⁵ As with any question of statutory interpretation, the language of the statute is paramount, see, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002).

¹⁶ As stated by the House Report, even as to "property . . . used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" (H.R. rep. No. 94-1487 at 20, reprinted at 1976 U.S.C.C.A.N. at 6619): "Actions short of attachment

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petitioners argue, ignore a purported distinction between rights and security interests in real property. It found such distinctions irrelevant, first, because the taxability of the property itself is a right that brings the subject matter of the dispute within the exception from sovereign immunity, and, second, as the City emphasized, and continues to emphasize, because a tax lien upon real property is a right in immovable property which is carved out of, encumbers and diminishes the right of the fee holder, and a judgment on the merits in the instant proceeding will either sustain or extinguish the right that is embodied in the lien.¹⁷

Although petitioners may be correct in asserting that prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute, see Petition for Certiorari, at pp. 14-15. this proposition is of no significance, because it is also true that no court during that

or execution seem to be permitted under the [Vienna] Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not disturbed."

¹⁷ Under New York Real Property Tax Law § 102(21), real property tax liens are encumbrances upon real property, which in turn are rights in property, Warren's Weed New York Real Property, at § 91.30. They are perpetual in duration, L. K. Land Corp. v. Gordon, 1 N.Y.2d 465, 136 N.E.2d 500, 154 N.Y.S.2d 463 (1955), and continue to encumber the property until they are paid. They run with the land. New York City Charter § 1519(2). They may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333. Such sales and assignments are defined as conveyances and are required to be recorded as such. NYC Administrative Code § 11-330. Conveyances are further defined as transfers of an "interest in real property." New York Real Property Law § 240(2). If not discharged, the liens will reduce the value of a property and will ultimately serve to divest the eventual non-diplomatic title-holder of both title and possession. See, NYC Administrative Code § 11-301.

period declined to exercise such jurisdiction. However, in 1978, two years after enactment of the FSIA, the court in County Board v. German Democratic Republic, 17 Intl Legal Materials 1404, did exercise jurisdiction.¹⁸

Once the Court of Appeals concluded from the legislative history of the FSIA that the statute “was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory,” the Court “look[ed] at contemporaneous expressions of the content of this exception to sovereign immunity for actions involving real property owned by the foreign state.” App. 12, 446 F.3d at 371. In so doing, it followed the statement of Reclamantes that “the immovable property exception was enacted to codify . . . the pre-existing . . . exception . . . recognized by international practice.” Reclamantes, 735 F.2d at 1521. These included Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965) (also relied on by Reclamantes, 735 F.2d at 1521), and the European Convention on State Immunity, May 16, 1972, ETS No. 74, “which was drafted in 1972 and ratified in 1976, just prior to the enactment of the FSIA.” App. 13, 446 F.3d at 371-372. In order to further clarify the general level of acceptance of the restrictive theory of sovereign immunity as applied to the law of real property at the time

¹⁸ No appeal was taken from that decision. See also York River House v. Pakistan Mission to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) (Leval, J.) (applying immovable property exception to plaintiff's lease dispute with Pakistan Mission to the U.N, even though, as the court subsequently held, York River House v. Pakistan Mission to the U.N., 820 F. Supp. 760 (S.D.N.Y. 1993), the lessor could not be evicted).

