COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (97) 10

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON DEBTS OF DIPLOMATIC MISSIONS, PERMANENT MISSIONS, AND DIPLOMATIC MISSIONS WITH "DOUBLE ACCREDITATION" AS WELL AS THOSE OF THEIR MEMBERS

(Adopted by the Committee of Ministers on 12 June 1997 at the 595th meeting of the Ministers' Deputies)

The Committee of Ministers of the Council of Europe, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Concerned about the problem of debts incurred by diplomatic missions, permanent missions and diplomatic missions with "double accreditation", as well as of those incurred by their members;

Conscious of the dilemma faced by creditors;

Stressing the obligation for all states to respect the provisions of the Vienna Convention on Diplomatic Relations;

Re-affirming the principle of the immunity of states;

Recalling that Article 31 of the Vienna Convention on Diplomatic Relations provides for the immunity of diplomatic agents;

Recalling that, under Article 41 of the Vienna Convention on Diplomatic Relations, it is the duty of all persons enjoying diplomatic immunities to respect the laws and regulations of the receiving state;

Aware that a failure by diplomatic missions, permanent missions, and diplomatic missions with "double accreditation" as well as by their members to settle their debts damages the credibility and reputation of the states concerned and of their diplomatic representatives, in particular in the eyes of the local population of the host state;

Noting that such a development has adverse consequences for host states and international organisations,

Recommends that the governments of member states take into account the measures envisaged in the appendix to this recommendation in order to remedy on a case by case basis the difficulties raised by debts.

Appendix to Recommendation No. R (97) 10

1. Introduction

The issue of indebtedness of diplomatic missions, permanent missions and diplomatic missions with "double accreditation" and of their members has become increasingly serious over the past decade. It concerns not only the diplomatic representations of states which have undergone political upheavals, but also those of states experiencing long-term cash-flow difficulties or states that are neglectful. This phenomenon does not solely concern diplomatic missions to states. It also arises in the case of permanent missions accredited to one or more intergovernmental organisations and diplomatic missions with "double accreditation", that is, those accredited concurrently to a state and to one or more intergovernmental organisations. This situation tarnishes the image of the countries concerned abroad and has adverse consequences for the diplomatic corps as a whole, making it the subject of wariness by the public and creditors. It has therefore become necessary to find solutions complying with international law and taking account of creditors' interests and rights.

The Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) has been mandated to study the legal and practical measures at the disposal of the receiving or host state in order to secure compliance of diplomatic representations and their members with their financial obligations. In particular, it has taken account of the work done by the United Nations Committee on Relations with the Host State on the Problem of Diplomatic Indebtedness.

2. Scope

i. *Diplomatic missions and their members*

The legal status of diplomatic missions to states and of their members is governed almost universally by the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereinafter referred to as "the convention"). The convention, which broadly reiterates customary international law, recognises special guarantees enabling diplomatic missions and their members to fulfil their functions, or at least making it easier for them to do so. These guarantees are known as "privileges and immunities". The preamble to the convention acknowledges the fundamental principle that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states". A consequence of this principle is the rule set out in the first paragraph of Article 41 of the convention, whereby it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving state.

The exclusively bilateral nature of a diplomatic mission, whose principal function is to represent the sending state in dealings with the receiving state, makes it easier to implement measures intended to secure compliance with financial obligations.

ii. *Permanent missions and their members*

The legal status of permanent missions accredited to one or more intergovernmental organisations is more complex. Their status, as well as that of their members, is governed by the headquarters agreement concluded between the intergovernmental organisation and the host state, or by other international instruments (including, in respect of certain states, the convention, which is applied by analogy) or further, by relevant national legislation.

In this case, instead of being bilateral, the relations become triangular since, in addition to the relations between the intergovernmental organisation and the permanent mission, there are the relations with the state in which the international organisation has its seat, the host state.

This relationship can place the host state in a difficult position in terms of ensuring that a permanent mission honours its financial obligations. Co-operation between the international organisation, the host state and the sending state may become necessary.

iii. *Diplomatic missions with "double accreditation" and their members*

"Double accreditation" occurs when a diplomatic mission is accredited both to a state and to one or more intergovernmental organisations. It then functions as an embassy and as a permanent mission. The mission in question and its members are subject to two separate sets of rules. On a bilateral level they are subject to the convention; however, in the triangular relationship linking the international organisation, the sending state represented by its permanent mission and the host state, they are governed by applicable international agreements.

In this special situation of double accreditation, the implementation of measures designed to reduce such missions' debts may also be difficult without the participation of the international organisation.

3. The legal situation

In this field, the rules and principles of international law (conventional and customary) governing diplomatic relations and state immunity apply. From a legal point of view, the debt problem differs according to whether the debts were incurred by a member of a diplomatic representation or by the diplomatic representation itself.

Diplomatic agents are better protected than the state they represent in that, under Article 31 of the convention, they enjoy immunity from civil and administrative jurisdiction, in addition to immunity from criminal jurisdiction. Where debts do not come within the ambit of the exceptions set out in Article 31, a diplomatic agent cannot be brought before the courts of the receiving state unless that agent's immunity from jurisdiction has been lifted. Lifting of immunity from jurisdiction still does not mean that a creditor can recover a debt, since Article 30 of the convention provides that a diplomatic agent's private residence and also his or her property, except as provided for in Article 31, shall be inviolable. It follows that a diplomatic agent cannot be evicted from his or her home and that funds deposited in an agent's private bank account cannot be seized except in the cases provided for by Article 31.

On the other hand, a diplomatic (or permanent) mission, being an organ of the sending state, does not have legal personality separate from that of the state in question, and it follows that debts incurred by a diplomatic mission are debts of the sending state. At the current stage of development of international law, foreign states are, in the practice of certain states, exempt from civil jurisdiction with regard to acts that are *jure imperii*, that is acts which, by virtue of their nature and, in the case of certain states, on account of their purpose, form part of the exercise of a state's public functions; conversely, this exemption is not acknowledged in respect of acts which are *jure gestionis* or *jure privatorum*. In so far as debts may be considered acts *jure gestionis*, the sending state cannot plead immunity from jurisdiction in the courts of the receiving state (host state).

However, the proportion of acts *jure gestionis* among the contracts which diplomatic missions or permanent missions may conclude varies between states. For example, in certain states, debts relating to leases, public services (postage, water, gas, etc.) and purchases of other goods where the state acts as a private person are regarded as debts resulting from *jure gestionis* activities. By contrast, in other states far fewer activities of diplomatic missions or permanent missions will qualify for consideration as *jure gestionis* activities, as the purpose of such activities relates to the exercise of public authority. Some states consider that enforcement measures may be taken. Whatever the case may be, Article 22 of the convention makes it impossible to take enforcement measures against a diplomatic mission's premises or property (for example of bank accounts in which an embassy deposits its working capital).

4. Possible solutions

The above legal analysis shows what stumbling blocks lie in the way of creditors seeking to recover debts. It is in the interest of the authorities of the receiving state (host state) to find solutions to the problem of indebtedness of diplomatic representations and their members, so that the obstacles confronting creditors as a result of immunities can be removed.

Implementation of the measures listed below is left entirely to the discretion of Council of Europe member states, who may refer to this list as and when the need arises.

I.

The measures provided for under section I are applicable to diplomatic missions, permanent missions and missions with "double accreditation" and to their members.

It is in the first instance for the protocol department of the ministry of foreign affairs of the receiving state (host state), which remains the sole judge of the advisability of intervention, to lend its good offices in order to settle disputes arising between diplomatic representations (or their members) and creditors. The protocol department should act as an intermediary in securing the friendly settlement of such disputes:

– to this end, the protocol department should contact the diplomatic representation to ask it to settle its debts or to request its agents to do so;

– should this fail, a more formal approach should be made to the head of the mission, including a convocation to the ministry of foreign affairs;

– concurrently, an approach may be made to the ministry of foreign affairs of the sending state through the ambassador accredited to that state;

– lastly, the matter may be raised at ministerial level.

II.

If creditors bring a recovery action in the courts of the receiving state (host state), either immediately after debts have not been honoured or only once an intervention by the ministry of foreign affairs' protocol department has proved unsuccessful, other measures may be taken by the receiving state (host state).

The following measures are applicable to diplomatic missions, permanent missions and missions with "double accreditation", and to their members:

– it is for the authorities of the receiving state (host state) to notify, in principle through diplomatic channels, the relevant judicial acts or decisions or to give this information to the sending state or the members of that state's representation;

– it is also for the authorities of the receiving state to transmit to the sending state requests for the lifting of immunity when an action is brought against a member of a diplomatic representation (diplomatic agents or members of administrative and technical staff).

III.

Should the above measures prove ineffective and be of no help in disposing of a particular case, the remedies available under the convention or other rules of international law should be used. However, a distinction should be made according to whether the debtor is a diplomatic mission, a permanent mission or a mission with "double accreditation". The same distinction should be made for their members.

i. *Diplomatic missions*

In bilateral relations, the receiving state may take the following steps:

– the receiving state may avail itself of the procedure under Article 9 of the convention (*persona non grata*);

– the receiving state may avail itself of the procedure under Article 11 of the convention resulting in a reduction of the staff of the diplomatic mission within limits which it considers reasonable;

– the receiving state may refuse its *agrément* of a new ambassador until debts are settled.

ii. *Permanent missions and missions with "double accreditation"*

In the triangular relationship between an intergovernmental organisation, the sending state and the receiving state (host state), the measures envisaged above in respect of a diplomatic mission cannot be applied to a permanent mission or mission with "double accreditation" in the same way as to diplomatic missions. Recalling members of diplomatic representations, reducing the staff of a representation or declaring its members *persona non grata* are measures which are available only if consistent with the applicable rules on privileges and immunities. In any event, they require consultation with the intergovernmental organisation concerned and its co-operation.