Journal of Air Law and Commerce

Volume 73 | Issue 4 Article 2

2008

Achieving a Level Playing Field in Space-Related Public-Private Partnerships: Can Sovereign Immunity Upset the Balance

Diane Howard

ACHIEVING A LEVEL PLAYING FIELD IN SPACE-RELATED PUBLIC-PRIVATE PARTNERSHIPS: CAN SOVEREIGN IMMUNITY UPSET THE BALANCE?

DIANE HOWARD*

"wolde you bothe eate your cake, and have your cake?"
John Heywood, 1546

I. INTRODUCTION

INCREASINGLY IMPORTANT to the space industry are the hybrid entities known as public-private partnerships ("P3s"), that result along the spectrum between the public and private sectors. They are neither new nor peculiar to space ventures. P3s can be found in a wide range of applications, including public utilities, infrastructure projects in developing countries, and social service delivery through the faith-based initiative in the United States.

Accountability in business is always a key concern, and space business certainly is no exception. If a government partner can avoid responsibility for its actions in space industry by invoking state immunity, the risks borne by the private side partner could

* Diane Howard is a practicing member of the Florida Bar, currently completing the requirements for her L.L.M. at McGill University, Institute of Air and Space Law.

be disproportionate to the possible upside potential. Such imbalance can create an uneven playing field and perhaps cripple commercial growth.

Following this Introduction, Section II of the paper will define public-private partnerships and identify some of the contexts in which they have operated, naming some emerging P3s in the space industry and articulating scenarios along the public-private continuum that could implicate government immunity.

Section III will begin with a discussion of the evolution of sovereign immunity and trace the development of state immunity jurisprudence in the United States, and will address immunity for foreign states, the federal government, and the states. This section also will outline the various tests to determine when and how immunity is to be applied in U.S. courts. Although primarily concerned with the U.S. experience, the paper also will outline a general discussion of immunities in the European Union and Canada.

Section IV will apply the tests to P3s and determine whether and when immunity might inure to the government partner in a space venture. Finally, the conclusion addresses some of the identified problems that have arisen in other P3 contexts and makes recommendations to the space industry to avoid those impediments to good business.

II. PUBLIC-PRIVATE PARTNERSHIPS DEFINED

Methods of financing public services have undergone significant transformation since World War II. "[T]he international trend was to nationalize energy and other infrastructure assets and institute strong controls over private monopolies in order to limit abuses of market power."[1] Over time, the costs of public ownership, subsidization, and the erosion of operational efficiency became apparent, resulting in a restructuring trend.[2] Internationally, governments felt pressure to change the standard models of procurement, largely because of concerns for high levels of public debt.[3]

In the United States, the Reagan Administration, faced with the growing cost of New Deal social programs, began to reduce

---

[1] Robert Taylor, Independent Regulation and Infrastructure Reform 2 (2006), http://www.ip3.org/pdf/2006_publication_012.pdf.

[2] *Id.*

[3] Wikipedia, Public-private partnerships, http://en.wikipedia.org/wiki/Public-private_partnership (last visited Sept. 7, 2008).

federal spending on social service delivery hoping that the non-profit sector—in partnership with the private sector—would strengthen.[4] A study of the effects of this reduction in federal support revealed that it was the private sector alone that moved in to compensate for the deficit, creating concerns about commercialism.[5] Some of these concerns arose because

> private institutions often pose a greater risk of harming others because of reduced governmental oversight. This possibility surfaces when considering the privatization of any public service; the private entity may produce more efficient or cost-effective results by avoiding responsibilities required of public entities. Even private entities are subject to public laws, then, when the public interest being protected is strong enough. As a result hybrid entities arise, performing public services but bound to adhere to certain regulations.[6]

Whereas privatization is on a "jolting downdraft,"[7] public-private partnerships are now hailed as "the new paradigm for economic development in the 21st century. . . increasingly being used as a policy tool to transform the role of national and local governments in public service delivery, infrastructure development, poverty alleviation, capital market improvement, and governance around the world."[8] This trend is global,[9] particularly in the European and Asian markets.[10] In an interview given in 1999 when he was Deputy Director of the Congressional Budget Office, Barry Anderson, now head of the Organization for Economic Cooperation and Development, expressed his belief that public-private partnerships were a possible mechanism to

---

[4] James C. Musselwhite, Jr., *The Impacts of New Federalism on Public/Private Partnerships* 16 PUBLIUS: J. FEDERALISM 113, 115 (1986).

[5] *Id.* at 129–30.

[6] St. Johnsbury Acad. v. D.H., 20 F. Supp. 2d 675, 683–84 (D. Vt. 1998).

[7] Jerome Donovan, Don't Want to Privatize? Then Corporatize (But Do it Right) (May 2006), www.IP3.org http://www.ip3.org/pub/2006_publication_006.pdf. Although the concepts of privatization and P3s often have been used interchangeably in the United States, this paper will treat the two as separate, discrete entities found at different points along the public-private continuum, with privatization referring to the furthest point on the private side, and the P3s falling somewhere along the spectrum, depending on the characteristics of each particular project.

[8] IP3, President's Welcome (Jan. 2008), http://www.ip3.org/a_president.htm.

[9] *See* Jumoke Jagun & Isabel Marques de Sa, The Role and Importance of Independent Advisors in PPP Transactions (Aug. 2006), http://www.ip3.org/pdf/2006_publication_014.pdf.

[10] *See* Jacques Cook, U.S. PPP Market on the Upswing: Some Thoughts from Abroad 1–2 (Apr. 2007), http://www.ip3.org/pdf/2007_publication_002.pdf.

achieve budget reform in the face of constraints on top-down budgeting mechanisms in the United States.[11]

P3s "generally [are] recognized [to exist] wherever there is a contractual relationship between the public sector and a private sector company designed to deliver a project or service that traditionally is carried out by the public sector."[12] In Canada, the term has a very specific meaning: "First, it relates to the provision of public services or public infrastructure. Second, it necessitates the transfer of risk between partners. Arrangements that do not include these two concepts are not technically 'public-private partnerships.'"[13] Allocation of risk is a necessary factor.

The Canadian Council for Public-Private Partnerships describes various business structures that fall within the parameters of P3s, as follows:

> **Design-Build (DB):** The private sector designs and builds infrastructure to meet public sector performance specifications, often for a fixed price, so the risk of cost overruns is transferred to the private sector. (Many do not consider DBs to be within the spectrum of [P3s]).
>
> **Operation & Maintenance Contract (O & M):** A private operator, under contract, operates a publicly-owned asset for a specified term. Ownership of the asset remains with the public entity.
>
> **Design-Build-Finance-Operate (DBFO):** The private sector designs, finances and constructs a new facility under a long-term lease, and operates the facility during the term of the lease. The private partner transfers the new facility to the public sector at the end of the lease term.
>
> **Build-Own-Operate (BOO):** The private sector finances, builds, owns and operates a facility or service in perpetuity. The public constraints are stated in the original agreement and through ongoing regulatory authority.
>
> **Build-Own-Operate-Transfer (BOOT):** A private entity receives a franchise to finance, design, build and operate a facility (and to charge user fees) for a specified period, after which ownership is transferred back to the public sector.
>
> **Buy-Build-Operate (BBO):** Transfer of a public asset to a private or quasi-public entity usually under contract that the assets are to

---

[11] *Interview with Barry Anderson, Deputy Director of the Congressional Budget Office*, 5 GEO. PUB. POL'Y REV. 23, 28 (1999).

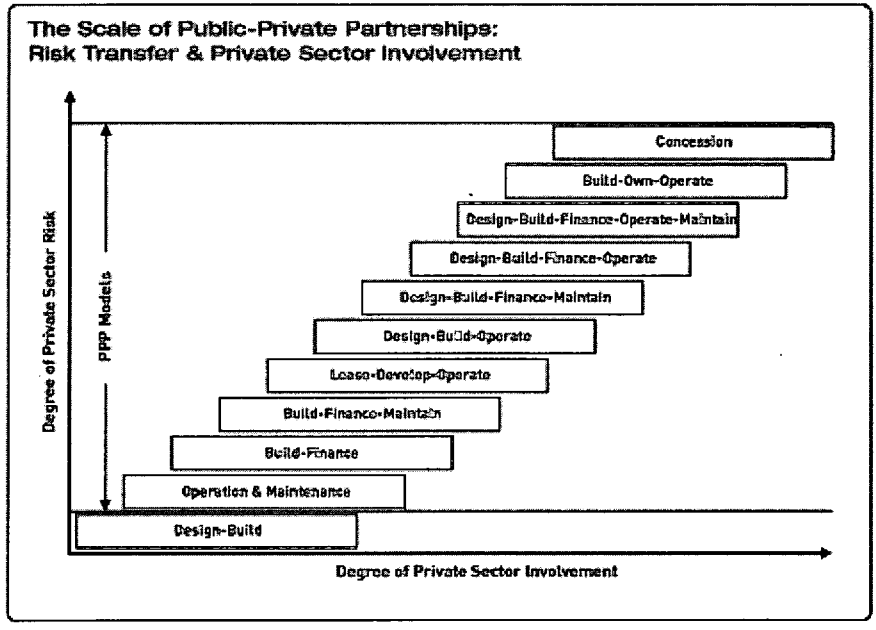
[12] Cook, *supra* note 10, at 1.

[13] Canadian Council for Public-Private Partnerships, http://www.pppcouncil.ca/aboutPPP_definition.asp (last visited Sept. 7, 2008).

be upgraded and operated for a specified period of time. Public control is exercised through the contract at the time of transfer.

Operation License: A private operator receives a license or rights to operate a public service, usually for a specified term. This is often used in IT projects.

Finance Only: A private entity, usually a financial services company, funds a project directly or uses various mechanisms such as a long-term lease or bond issue.[14]



[15]

P3s are creative arrangements. Usually, a governmental entity contracts with a private consortium which sets up a single-purpose entity known as a special purpose vehicle ("SPV").[16] The private consortium typically is formed by a joint venture ("JV") between a range of contractors, banks, investors, and suppliers willing to commit equity and/or resources to the project.[17]

Some underlying principles are indispensable to the success of P3s. Value for money is crucial and "refers to the best availa-

---

[14] *Id.*

[15] *Id.*

[16] A. Ng & Martin Loosemore, *Risk Allocation in the Private Provision of Public Infrastructure*, 25 INT'L J. PROJECT MGMT. 66, 67 (2007).

[17] *Id.*

ble outcome after taking account of all benefits, costs and risks over the whole life of the procurement."[18]

> [R]isk is perceived from the public sector's [perspective] as any event which jeopardizes the quality or quantity of service that they have contracted for, and from the private sector's [perspective] as . . . any event which causes the cash flow profile of the project to depart from the base case and jeopardize the debt servicing ability of the project or its ability to generate a dividend stream for shareholders.[19]

Potential risks can be divided into "general risks" and "project risks."[20] Project risks flow from management and events in the project's immediate environment, such as weather, plant and equipment, union difficulties, disputes with the JV agreements, technical, materials and supply, organizational, and environmental problems.[21] General risks are not directly associated with the project itself, but have an effect on its outcome.[22] They tend to occur in the macro-environment and arise from natural, political, regulatory, legal, and economic events.[23]

The costs associated with payment of claims against a project are a contemplated risk more likely to fall into the project risk category, although there is the possibility this could occur outside the immediate project environment. Note the difference between a standard contractual claim and one flowing from a 9/11-type catastrophe. Risks associated with SPVs and contractual difficulties have also been called "sponsor risk" or "default risk."[24] Optimally, risks are allocated to the party in the best position to control them. Rules guiding optimal distribution of risk require that the party to whom the risk is allocated:

- has been made fully aware of the risks they are taking;
- has the greatest capacity [expertise and authority] to manage the risk effectively and efficiently (and thus charge the lowest risk premium);
- has the capability and resources to cope with the risk eventuating;

---

[18] XIAO-HUA JIN & HEMANTA DOLOI, RISK ALLOCATION IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS—AN INNOVATIVE MODEL WITH AN INTELLIGENT APPROACH 3 (2007), *available at* http://www.rics.org/NR/rdonlyres/21C6D994-732D-46EF-8B48-66815F21DAA7/0/Cob2007Jin.pdf.

[19] *Id.* at 3–4 (citations omitted).

[20] Ng & Loosemore, *supra* note 16, at 69.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 70.

- has the necessary risk appetite to want to take the risk; and
- has been given the chance to charge an appropriate premium for taking it.[25]

Internationally, examples of P3s abound. They include, *inter alia*, airports, airlines, tunnels, highways, hospitals, social programs, defense facilities, rapid transit systems, bridges, health service delivery systems, governance infrastructure, schools and universities, air traffic services, power providers, Central Park in New York City, the U.S. Federal Reserve, water taxi companies, InfraGard (the FBI and the private sector), construction projects, ports, domestic telecommunications infrastructure, and the information superhighway.[26] It is in these varying contexts that the existing P3 state immunity jurisprudence has evolved.

Commercial space mirrors this trend toward hybrid entities; examples can be found in a host of space applications encompassing remote sensing, international telecommunications, global navigation, proposed space solar power systems, and spaceports. Because this paper is primarily concerned with the space industry, specific examples are given below.

In the United States, the Department of Defense partnered with Intelsat, Ltd. and Cisco Systems, Inc. to facilitate high-speed internet access to military units not tied to a particular location.[27] The initial cost will be borne by private investors and a private equity fund, in hopes that "the military will make long-term commitments to support [future technologies] and new acquisition procedures."[28] The technological application will be added to an Intelsat satellite already under construction.[29] The project includes government monies for testing and evaluation,

---

[25] *Id.*

[26] *See generally* Clávio Valença Filho & João Bosco Lee, *Brazil's New Public-Private Partnership Law: One Step Forward, Two Steps Back*, 22 J. INT'L ARB. 419 (2005); Ronald Paul Hill, *Service Provision Through Public-Private Partnerships: An Ethnography of Service Delivery to Homeless Teenagers*, 4 J. SERVICE RES. 278 (2002); Matthew H. Hoy, *The Information Superhighway: The Road to Rural Economic Development?*, 6 KAN. J.L. & PUB. POL'Y 217 (1996); Jagun & Marques de Sa, *supra* note 9; Nicholas P. Miller & Kenneth A. Brunetti, Using Public-Private Partnerships to Develop Intelligent Transportation Systems: Potential Legal Barriers (2000), *available at* http://www.millervaneaton.com/briefs_memos/using_public_private.doc; Wikipedia, *supra* note 3.

[27] Andy Pasztor, *Pentagon, Private Firms Set Satellite Partnership*, WALL ST. J., Apr. 9, 2007, at A9.

[28] *Id.*

[29] *Id.*

but allows the military to test the new hardware for a fraction of the cost if the project was contemplated as purely military.[30]

Other examples of satellite operations that bridge the public-private divide include COSMO-SkyMed, TerraSAR-X, RADARSAT-2, and Skynet. COSMO-SkyMed, jointly developed by Italy and France, is a program of the Italian space agency and the Italian Ministry of Defence and consists of the first of four satellites planned to form a dual-use (military and civil) earth observation system.[31] On the other hand, TerraSAR-X is a German radar satellite resulting from the partnership between the German Aerospace Center and Astrium GmbH.[32] The objectives of this partnership are the provision of data for scientific research and applications and the establishment of a commercial earth observation market and sustainable business.[33]

Earth observation collaboration can be found in RADARSAT-2, between the Canadian Space Agency ("CSA") and MacDonald, Dettwiler and Associates, Ltd.[34] The CSA will recover its financial investment in the program through the supply of RADARSAT-2 data to Canadian government agencies during the lifetime of the mission.[35] Skynet 5 is a military telecommunications satellite that is owned by a private company, Paradigm Secure Communications, a subsidiary of Astrium, the space arm of the European Aeronautic Defence and Space Company ("EADS").[36] Additionally, commercial imaging firms DigitalGlobe and GeoEye have partnered with the U.S. Geological Survey in support of a global emergency response network.[37]

Joseph Rouge, new head of the U.S. National Security Space Office, has acknowledged the interdependence of public and

---

[30] *Id.*

[31] Deagel.com, COSMO-SkyMed, http://www.deagel.com/C3ISTAR-Satellites/COSMO-SkyMed_a000256001.aspx (last visited Sept. 7, 2008); Swedish Space Corp., SSC Supports Italian Observation Satellite (June 8, 2007), http://www.rymdbolaget.se/?id=5104&cid=8496.

[32] German Aerospace Ctr., TerraSAR-X Goes Into Operation (Jan. 9, 2008), http://www.dlr.de/en/desktopdefault.aspx/tabid-4219/6774_read-11191/.

[33] *See id.*

[34] RADARSAT-2, Mission, http://www.radarsat2.info/about/mission.asp (last visited Sept. 7, 2008).

[35] *Id.*

[36] Andrew Chuter, *New U.K. Milsat Follows Pattern of Private Ownership*, DEF. NEWS, May 21, 2007, at 16.

[37] Earth Observation News, Commercial Satellite Imagery Companies Partner with the U.S. Geological Survey in Support of the International Charter "Space and Major Disasters" (Apr. 12, 2007), http://news.eoportal.org/policy/070417_poll.html.

private sectors, both from the perspective of space situational awareness[38] and that of long-term relationships—including multi-year contracts—between the U.S. government and commercial satellite and remote sensing companies.[39] Neighborhood Watch is the U.S. military program aligning government and industry resources to address the escalating amount of space debris and to increase space situational awareness.[40]

The U.S. military, heavily reliant on satellite communications, publicly has recognized the importance of the commercial sector in meeting its capacity shortfalls.[41] The U.S. Defense Information Systems Agency intends to upgrade the Transformational Communications Architecture serving the Department of Defense, the intelligence community, and NASA; the new version will expand the potential role of COMSATCOM and will leverage emerging commercial satellite capabilities.[42]

Another example of the dynamic shift between commercial and government space is NASA's $500 million U.S. Commercial Orbital Transportation Services ("COTS") program, designed to spur private development of commercial spacecraft that also can service the International Space Station.[43] NASA agreements provide companies with the projected requirements, objective criteria, information, and acknowledgement when performance milestones are met.[44] In addition, NASA plans to give away half of its rack space on the International Space Station as an incentive for participation in the COTS program,[45] and is shopping

---

[38] *See* JOSEPH ROUGE, NAT'L SEC. SPACE OFFICE, THE STATE OF SPACE SECURITY: SPACE SITUATIONAL AWARENESS 3 (2008), *available at* http://www.gwu.edu/~spi/Joseph%20Rouge.pdf.

[39] Caitlin Harrington, *U.S. Space Office Plans Long-Term View for Satellite Usage*, JANE'S DEF. WKLY., Nov. 28, 2007, at 8.

[40] ROUGE, *supra* note 38, at 8.

[41] *See* SatNews Daily, Final Day of ISCe Stress Importance of Commercial Satellite Industry and Government Partnership (June 8, 2007), http://www.satnews.com/stories2007/4573/.

[42] Mark A. Kellner, *Satellite Firms Could Sell Directly to DoD*, DEF. NEWS, Jan. 15, 2007, at 6.

[43] Frank Morring, Jr., *Tourist Destination*, AVIATION WK. & SPACE TECH., Apr. 16, 2007, at 22, *available at* 2007 WLNR 8624601.

[44] Press Release, NASA, NASA Signs Commercial Space Transportation Agreements (June 18, 2007), http://www.nasa.gov/home/hqnews/2007/jun/HQ_07138_COTS_3_Unfunded_SAAs.html.

[45] David Bond, *Seeding the Station*, AVIATION WK. & SPACE TECH., Oct. 22, 2007, at 25, *available at* 2007 WLNR 22357663.

for commercial and military users of the Ares launch vehicles being developed for its Constellation program.[46]

Two leading aerospace companies, Boeing and Lockheed Martin, plan to expand their joint venture, United Space Alliance (created to operate NASA's shuttle fleet) into "software packages designed to support human exploration of the Moon."[47] The plan is to use information from NASA's 2008 Lunar Reconnaissance Orbiter in conjunction with lessons learned from past human spaceflight on the shuttle to develop applications ranging from mission design to inventory control.[48]

Spaceports probably lend themselves most easily to extrapolation of state immunity doctrine in a P3 structured project because of their similarities to airports and port authorities, for which there is some existing precedent.[49] Spaceport America unveiled design renderings for its commercial spaceport center in Sierra County, New Mexico.[50] The project is the first "purpose-built" commercial spaceport,[51] and is projected to stimulate as many as 5,000 new jobs and contribute as much as $1 billion to the New Mexico economy.[52] The spaceport will be home base for Richard Branson's Virgin Galactic,[53] is facilitated by a county Spaceport Tax,[54] and is a good example of a public-private partnership. When completed, the facility will house aircraft and spacecraft, as well as Virgin Galactic's operations, in-

---

[46] James R. Asker, *Ride Sharing*, AVIATION WK. & SPACE TECH., Apr. 16, 2007, at 27, *available at* 2007 WLNR 8624646.

[47] Frank Morring, Jr., *Software Support*, AVIATION WK. & SPACE TECH., Apr. 16, 2007, at 22, *available at* 2007 WLNR 8624593.

[48] *Id.*

[49] *See generally* Ports Auth. of P.R. v. Compañia Panameña de Aviacion, 77 F. Supp. 2d 227 (D.P.R. 1999); Fla. Dept. of Rev. v. City of Gainesville, 918 So. 2d 250 (Fla. 2005).

[50] Press Release, Spaceport America, Spaceport America Design Unveiled (Sept. 4, 2007), http://www.spaceportamerica.com/news/press-releases/18-spaceport-press-articles/58-design-unveiled.html.

[51] *Id.*

[52] Press Release, Spaceport America, Spaceport America Ready for Blast Off (Apr. 5, 2007), http://www.spaceportamerica.com/news/press-releases/18-spaceport-press-articles/96-spa-ready-for-blastoff.html.

[53] Leonard David, *Spaceport America: First Looks at a New Space Terminal*, SPACE.COM, Sept. 4, 2007, http://www.space.com/businesstechnology/070904_virgingalactic_spaceport.html.

[54] Press Release, Spaceport America, Sierra County Voters Approve Spaceport Tax (Apr. 22, 2008), http://www.spaceportamerica.com/news/press-releases/18-spaceport-press-articles/110-sierra-county-voters-app-tax.html.

cluding pre-flight and post-flight facilities, administrative offices, and lounges.[55]

Space Florida is the public-private partnership legislatively created to promote the development of Florida's aerospace industry.[56] The cooperative venture has begun with a spaceport using already existing infrastructure, and envisions multiple spaceports throughout the state, supporting commercial space and personal spaceflight, as well as military and civil applications.[57]

Despite these successful examples of ventures that fall within the spectrum of public-private cooperation, instructive is the sad story of Europe's Galileo, a global navigation service system. The European Commission abandoned the original plan for substantial participation by the private sector in the face of liability concerns.[58] In June 2007, transport ministers decided to go ahead with Galileo as a publicly-funded project.[59] The failure of the state-private partnership in the Galileo project demonstrates why appropriate allocation of risk between public and private partners necessitates discussion of state immunity.

It is easy to imagine scenarios in which the public partner of a space-related P3 could attempt to evade a lawsuit. A breach of contract flowing from the P3 agreement itself could be avoided. Third party liability to private parties for accidents in a spaceport launch facility (such as the explosion at Scaled Composites in 2007)[60] could be circumvented. A government partner could sidestep liability for any simple slip-and-fall in a spaceport or facility of a space P3. Responsibility for damage from the cessation or malfunction of a signal of a global emergency response system or navigation system could be dodged.

---

[55] David, *supra* note 53.

[56] SCI. APPLICATIONS INT'L CORP., SPACE FLORIDA: STRATEGIC BUSINESS PLAN 1-2 (2007), *available at* http://www.spaceflorida.gov/docs/Strategic_Business_Plan-2007-2.pdf.

[57] *Id.* at 13.

[58] Elmar Giemulla & Oliver Heinrich, *Haftungsrisiken und Haftungsmanagement im Sat-Nav Bereich (Galileo)* [*The Impact of Responsibility and Liability for Galileo Services on System-Financing and Commercialization*], 57 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT [GERMAN J. AIR & SPACE L.] 25, 39 (2008); *see* Taylor Dinerman, *Galileo and Her Majesty's Taxpayers*, SPACE REV., July 9, 2007, http://www.thespacereview.com/article/904/1.

[59] CMDBox, Galileo Funding Solution Remains Elusive (Sept. 18, 2007), http://www.cmdbox.com/view/Galileo_Funding_Solution_Remains_22651/.

[60] Alicia Chang, 3 Dead, 3 Injured in Scaled Composites Explosion (July 27, 2007), http://www.space.com/news/ap_070727_scaled_folo.html.

It is worth noting that the International Civil Aviation Organization ("ICAO") listed sovereign immunity as an identified liability concern for the Global Navigation Satellite System in its *Final Report on the Work of the Secretariat Study Group on Legal Aspects of CNS/ATM Systems.*[61] And, in litigation now before the U.S. courts, an Israeli-owned and controlled remote sensing corporation, ImageSat, has claimed immunity in a shareholder's derivative action questioning business decisions.[62] An understanding of the background, purposes, and mechanics of government immunity can only help the space industry address these situations proactively.

III. GOVERNMENT IMMUNITY

A. BACKGROUND

"Sovereign immunity encompasses immunity from both suit and liability."[63] "A recognized state [enjoys] immunity from the jurisdiction of the courts of other states."[64] The doctrine can operate as a bar to actions between sovereigns, but more often is implicated in actions between private parties engaged in activities with governmental entities.[65]

Two schools of thought exist on the origins of the doctrine. One is based upon the theory that as sovereign equals, one state cannot exercise authority over another, while the other is based upon the common law tradition originating with the Romans—*rex non potest peccare*—that "the king could do no wrong."[66] Immunity can extend from the head of state to the government and its organs, the leader of the government (if a different per-

---

[61] Secretariat Study Group, *Final Report on the Work of the Secretariat Study Group on Legal Aspects of CNS/ATM Systems* app. § 3.4.1 (Int'l Civil Aviation Org., Working Paper No. C-WP/12197, 2004).

[62] Wilson v. ImageSat Int'l N.V., No. Civ. 6176(DLC), 2008 WL 2851511 (S.D.N.Y. July 30, 2008), *appeal docketed* (2d Cir. Aug. 21, 2008). *See generally* Jason A. Crook, *Corporate-Sovereign Symbiosis: Wilson v. ImageSat International, Shareholders' Actions, and the Dualistic Nature of State-Owned Corporations*, 33 J. SPACE L. 411 (2007).

[63] Gulf Electroquip, Inc. v. Univ. of Tex. at Austin, No. 14-00-01149-CV, 2002 WL 480245, at *1 (Tex. App. Houston—[14th Dist.] Mar. 28, 2002, pet. denied); *see also* GLF Constr. Corp. v. LAN/STV, 414 F.3d 553, 557 (5th Cir. 2005).

[64] HUGH M. KINDRED ET AL., INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 285 (7th ed. 2006).

[65] *See id.* at 289–90.

[66] Pro2, http://www.proz.com/kudoz/latin_to_english/law_patents/101818-rex_non_potes_peccare.html; M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 96–97 (1999).

son), ministers, officials, agents of the state for their official acts, some public corporations, and state-owned property.[67]

Absolute immunity is just that—immunity for all government acts—"susceptible of no limitation not imposed by itself."[68] That view was fully embraced by 1926 in *Berizzi Brothers v. The Pesaro.*[69] It is "the product of comity concerns rather than a want of juridical power."[70]

However, the State Department and the U.S. Supreme Court seemingly were at odds in application of the immunity. The State Department was concerned that adjudications against foreign sovereigns could "embarrass the executive arm of the government," leading to Supreme Court reluctance to adjudicate at all.[71] By the mid-twentieth century, the Supreme Court recognized the commercial advantage that absolute immunity provided to foreign sovereigns over private businesses.[72] The State Department reconsidered its position and recognized that the extended immunities possibly were based upon outdated conceptions of sovereignty.[73]

The Acting Legal Advisor of the Department of State, Jack B. Tate, wrote a letter to the Acting Attorney General in May 1952, stating:

> According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).
>
> . . . .
>
> [T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

---

[67] KINDRED ET AL., *supra* note 64, at 290.

[68] The Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812).

[69] 271 U.S. 562, 574–76 (1926).

[70] Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2358 (2007) (Stevens, J., dissenting).

[71] *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

[72] Mofidi, *supra* note 66, at 99.

[73] Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law,* 44 N.Y.U. L. REV. 901, 906 (1969).

> It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive had declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.[74]

The Tate Letter, as it became known, was only a partial success in resolving the uncertainty surrounding sovereign immunity. While it expressed succinctly the shift from absolute to restrictive immunity, distinguishing between public and private acts of a state, it left unsettled the matter of who should determine whether immunity attached in a given situation—the courts or the State Department.

For more than twenty years this ambiguity remained, allowing foreign states the alternative of seeking State Department approval for claims of immunity, creating the possibility that the Department would give in to political pressure. The European Convention on State Immunity, adopting restrictive state immunity, was signed by all members of the Council of Europe in 1972.[75] Eventually, the United States enacted the Foreign States Immunity Act ("FSIA") in 1976, codifying the restrictive theory and reflecting the policy followed by a majority of States.[76] One of the most significant results of the Act was that it settled the question of jurisdiction, placing the responsibility in the judicial system rather than in the State Department.[77]

Trendtex Trading Corp. v. Central Bank of Nigeria contains an interesting perspective on the position of the international community on the subject of state immunity in 1977, one year after the FSIA was enacted.[78] The United Kingdom passed its State Immunity Act in 1978;[79] Canada followed with its State Immunity Act in 1985.[80] Both adopted restrictive immunity. The United Nations Convention on the Jurisdictional Immunities of States and Their Property was adopted by the General Assembly

---

[74] *Id.* (citing The Tate Letter, 26 DEP'T STATE BULL. 984 (1952)).

[75] European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 074.

[76] *See* 28 U.S.C. §§ 1602–1611 (2000 & Supp. 2005).

[77] 28 U.S.C. § 1330(a) (2000).

[78] *See generally* Trendtex Trading Corp. v. Cent. Bank of Nig., [1977] 1 Q.B. 529 (C.A.).

[79] State Immunity Act, 1978 c. 33 (Eng.).

[80] State Immunity Act, R.S.C., ch. S 18 (1985).

in 2004.[81] The new instrument also reflects the restrictive theory of state immunity.

The U.S. Supreme Court officially espoused restrictive immunity for foreign states in *Alfred Dunhill of London, Inc. v. Republic of Cuba*;[82] although the case was argued under a different theory—the act of state doctrine—discussed *infra* section III.B. The Court found that the case essentially dealt with the issue of immunity, which it denied because the conduct was commercial in nature.[83]

B. Foreign States Immunity Act

"[T]he text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts."[84] As a starting point, then, "a foreign state is presumptively immune from suit unless a specific exception applies."[85]

> [C]ourts employ a burden-shifting analysis. The defendant [foreign state] must first establish a prima facie case that it is a sovereign state, creating a rebuttable presumption of immunity. Once the foreign sovereign makes that prima facie showing of immunity, the plaintiff has the burden of production to make an initial showing that an FSIA exception to foreign immunity applies.[86]

The court must resolve whether foreign sovereign status applies—a question of law—as a threshold matter. The statute contains rather elaborate definitions:

> § 1603. Definitions
> For purposes of this chapter—
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—(1) which is a separate legal person, corporate or otherwise, and

---

[81] United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 16, 2004, 44 I.L.M. 803.

[82] 425 U.S. 682, 705–06 (1976).

[83] *Id.*

[84] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

[85] Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2355 (2007).

[86] Orient Mineral Co. v. Bank of China, 506 F.3d 980, 991 (10th Cir. 2007) (citations omitted).

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.[87]

Though not directly applied, in *Dole Food Co. v. Patrickson*,[88] the U.S. Supreme Court affirmed as correct the application of the five-factor framework used by federal appellate courts to determine whether an entity is an organ or instrumentality of the state as defined in 28 U.S.C. § 1604(b). The factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.[89]

Some lower U.S. courts have used "a 'characteristics' test, asking whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, and hold property in its own name."[90] Other courts, mainly appellate, have adopted a "core functions" test limiting inquiry to "whether the defendant is 'an integral part of a foreign state's political structure' or, by contrast, 'an entity whose structure and function is predominantly commercial.'"[91]

In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, a private citizen, having received a judgment against Iran in an unrelated case, sought to attach an arbitral award against a military sup-

---

[87] 28 U.S.C. §§ 1603(a)–(b) (2000).

[88] 538 U.S. 468, 473 (2003) (affirming the Ninth Circuit holding that Dole Foods did not meet the definition of an instrumentality of a foreign state when the facts were applied to the five factors described herein); *see* Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001).

[89] Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp., 478 F.3d 274, 279 (2007) (holding that regulation was not supervision, nor was research a government function or an exclusive obligation or right such that Japan's largest telecommunications company was immune from suit in a U.S. patent action as an instrumentality of the state); *see also* Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., 476 F.3d 140, 143 (2d Cir. 2007); Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004).

[90] Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 495 F.3d 1024, 1034 (9th Cir. 2007).

[91] *Id.*

plier in favor of Iran.[92] Although the Circuit Court initially held that litigation concerning attachment of Iran's award was within its jurisdiction as a commercial exception under the FSIA, the U.S. Supreme Court reversed, ruling that the Ministry was an agency of Iran.[93] In his second attempt to collect, Elahi, the judgment creditor, brought an action under the Terrorism Risk Insurance Act ("TRIA") and the Victims Protection Act.[94] The Circuit Court allowed the claim and found Iran's immunity waived.[95] Whether the Ministry of Defense's asset, the award, could be attached as an instrumentality of Iran became the ultimate issue.

The *Cubic Defense* court applied the "core functions" test, asking whether the defendant was an integral part of Iran's political structure or, alternately, "an entity whose structure and function [was] predominantly commercial."[96] Acknowledging a "strong presumption that the armed forces constitute a part of the foreign state itself," one that Elahi failed to rebut, the court found the Ministry's asset to be out of reach.[97]

Elahi did not give up. He argued that the award could be attached under section 1610(a) of the FSIA, allowing attachment of foreign-owned property in the United States that had been used for a commercial activity.[98] Elahi argued that the arbitral award arose out of the Ministry's commercial activity (sale for military goods and services).[99] The court did not agree, although it seems the court misapplied the nature test in coming to that conclusion. Finally, the court allowed Elahi to attach under the TRIA.[100]

Instrumentality status is determined by the facts at the time the action is filed.[101] In other words, if the foreign state's interest in a corporation was not a majority interest until after filing, then the claim of instrumentality more than likely would fail. Likewise, if a foreign state-owned entity, such as an airline, is

---

[92] *Id.* at 1027–29.

[93] Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 546 U.S. 450, 453 (2006).

[94] *Cubic Def.*, 495 F.3d at 1030–34.

[95] *Id.* at 1034.

[96] *Id.* at 1034–35.

[97] *Id.* at 1035.

[98] *Id.* at 1036.

[99] *Id.*

[100] *Id.* at 1037.

[101] *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003); Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A., 509 F.3d 347, 349 (7th Cir. 2007).

privatized after a claim arose, the claim would not lose its status under the FSIA.[102] Furthermore, the U.S. Supreme Court held that control could not be substituted for ownership interest, and that a subsidiary of an instrumentality could not by itself be found an instrumentality, as it was too far removed.[103]

Because the FSIA grants subject matter jurisdiction over the foreign state, objection to this jurisdiction may be raised at any time.[104] And before a court may enter a default against a foreign state, the FSIA requires the plaintiff to establish to the court's satisfaction his or her right to relief.[105]

Once the defendant has made its case for immunity, the burden shifts to the plaintiff to prove that one of the seven statutory exceptions applies, granting the court jurisdiction to hear the case.[106] The commercial activity exception found in FSIA section 1605(a)(2) is the most significant of those enumerated.[107] For the purposes of this paper, it is necessary to quote substantive provisions of the statute, *inter alia.*

> § 1605. General exceptions to the jurisdictional immunity of a foreign state
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such

---

[102] Leith v. Lufthansa German Airlines, 897 F. Supp. 1115, 1115–16 (N.D. Ill. 1995).

[103] *Dole*, 538 U.S. at 477.

[104] Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

[105] 28 U.S.C. § 1608(e) (2000); *Cubic Def.*, 495 F.3d at 1028 n.1.

[106] Orient Mineral Co. v. Bank of China, 506 F.3d 980, 991 (10th Cir. 2007).

[107] Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 611 (1992).

> property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[108]
>
> The Act defines "commercial activity" as
>
> (d) . . . either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.[109]

The courts have carved out definitions and tests to assure proper application of sections 1603(d) and (e), and 1605(a)(2) to the facts of a given case.[110] In *Saudi Arabia v. Nelson*, the U.S. Supreme Court held that eligibility for the commercial activity exception requires identification of the particular conduct upon which the claim is "based," or the "gravamen of the complaint," as per the statutory language.[111] It is not enough that commercial activity have some loose connection to the basis of claim;[112] the offending conduct must flow from genuine commercial activity.

The statute expressly dictates that it is the nature of an act that determines its commercial character, not the purpose of that act.[113] The U.S. Supreme Court described this distinction aptly:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce." Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial"

---

[108] 28 U.S.C. § 1605(a) (2000).

[109] *Id.* §§ 1603(d)–(e).

[110] *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349, 356–57 (1993).

[111] *Id.* at 357.

[112] *Id.* at 358.

[113] 28 U.S.C. § 1603(d).

activity, because private companies can similarly use sales contracts to acquire goods.[114]

The FSIA breaks the commercial activity exception into three alternative scenarios, each providing sufficient connection to the United States to afford a jurisdictional nexus.[115] First, the commercial activity can be conducted in the United States by the foreign state.[116] Next, it can be an act performed in the United States but in connection with a commercial activity of the foreign state somewhere else.[117] Third, it can be predicated upon an act outside U.S. territory in connection with commercial activity of the foreign state elsewhere if that extra-territorial act caused a direct effect in the United States.[118]

In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'"[119] This holding was expanded in *American Telecom Co. v. Republic of Lebanon*, a recent Sixth Circuit case, where that court applied the principle *de minimis non curat lex* to ensure that jurisdiction was not based upon "purely trivial effects."[120] The court acknowledged the difficulty in applying *Weltover's* "immediate consequences" test and analyzed it in terms of the "legally significant act" test.[121] The court found that second test unnecessary and held:

> [T]he mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and therefore, does not "cause a direct effect in the United States" for purposes of 28 U.S.C. § 1605(a)(2).[122]

World Wide Minerals, Ltd. v. Republic of Kazakhstan[123] not only sheds light on the sufficiency of waivers to abrogate immunity, it does so in the context of a P3. In this case, the government of

---

[114] Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614–15 (1992) (citations omitted); *see also* El-Hadad v. United Arab Emirates, 496 F.3d 658, 667 (D.C. Cir. 2007).

[115] 28 U.S.C. § 1605(a)(2).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Weltover*, 504 U.S. at 618.

[120] 501 F.3d 534, 539 (6th Cir. 2007).

[121] *Id.* at 539–40.

[122] *Id.* at 541.

[123] 296 F.3d 1154 (D.C. Cir. 2002).

Kazakhstan entered into four agreements with a Canadian company in an effort to privatize its uranium industry.[124] One of the agreements actually contemplated a P3 joint venture.[125] Among the government's responsibilities per the agreements was to issue export licenses, which it did not do.[126] The deal failed and the private company brought suit in a U.S. court, naming Kazakhstan and a U.S. company as defendants.[127] At issue were waivers contained in two of the four agreements; the other two contained none.[128] Waivers, both express and implied, are contemplated exceptions to state immunity.[129]

The plaintiff attempted to rebut Kazakhstan's immunity on the grounds of the waivers.[130] Interestingly, it did not argue the commercial activity exception.[131] "In general, explicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires.'"[132] Under section 1605(a)(1), express waivers must be "clear, complete, unambiguous, and [an] unmistakable manifestation of the sovereign's intent to waive its immunity."[133] World Wide Minerals asked the court to find implied waiver for the two agreements that were silent on the issue.[134] The court held, however, that the silence led to ambiguity as to the government's intent and found only express waivers for the two agreements where they were included.[135] The story does not stop there. Although the court found that it had subject matter jurisdiction, dismantling Kazakhstan's immunity over two of the claims, it still dismissed World Wide Mineral's action, holding that Kazakhstan's decision not to issue the export licenses was an act of state not to be second guessed by the court.[136]

Any discussion of adjudication over sovereign acts must include the act of state doctrine which "precludes [U.S.] courts . . . from inquiring into the validity of the public acts a recog-

---

[124] *Id.* at 1157.
[125] *Id.* at 1157–58.
[126] *Id.* at 1157.
[127] *Id.* at 1158–59.
[128] *Id.* at 1161.
[129] 28 U.S.C. § 1605(a)(1) (2000); *World Wide Minerals*, 296 F.3d at 1161.
[130] *World Wide Minerals*, 296 F.3d at 1161.
[131] *Id.*
[132] *Id.* at 1162 (citing Library of Cong. v. Shaw, 478 U.S. 310, 318 (1986)).
[133] *Id.*
[134] *Id.* at 1162–63.
[135] *Id.*
[136] *Id.* at 1167.

nized foreign sovereign power committed within its own territory."[137] The act of state doctrine is important to consider when examining the types of actions for which a public partner in a P3 can be held accountable even if a valid waiver is in place. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[138] the U.S. Supreme Court "was evenly divided on . . . whether the 'commercial' exception . . . also limited the availability of an act-of-state defense."[139] *Republic of Argentina v. Weltover, Inc.* revisited the issue when forced to rule on whether Argentina's issuance of commercial bonds to raise capital for its economy—and its unilateral extension of the time to pay on those bonds—was (i) an act of a sovereign to fulfill its obligations when confronted with a national credit crisis, (ii) an act of state, or (iii) simply a commercial decision which any issuer of debt instruments could make.[140] The Court used the nature v. purpose test to conclude that Argentina's actions were not an act of state but participation of a private actor.[141]

In some situations a civil servant inquiry becomes relevant, such as when an employee brings an action against a foreign state for its actions in relation to his or her employment. Although not all U.S. Circuit Courts are in agreement with respect to this, in *El-Hadad v. United Arab Emirates*, the Circuit Court for the District of Columbia applied a flexible test, listing five relevant considerations while acknowledging that the list was not exhaustive.[142]

> First, how do the U.A.E.'s own laws define its civil service, and do El-Hadad's job title and duties come within that definition?
> Second, what was the nature of El-Hadad's employment relationship with the U.A.E.? Did he have a true contractual arrangement, or is his "contract" claim instead based . . . solely upon the civil service laws of the U.A.E.?
> Third, what was the nature of El-Hadad's employment relationship when he worked in the U.A.E., and how did his subsequent employment at the Embassy relate to that prior tenure? . . .
> . . . .
> Fourth, what was the nature of El-Hadad's work? . . .

---

[137] *Id.* at 1164–65 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964)).

[138] 425 U.S. 682 (1975).

[139] Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 613 (1992).

[140] *Id.* at 615–16.

[141] *Id.* at 616–17.

[142] El-Hadad v. United Arab Emirates, 496 F.3d 658, 665 (D.C. Cir. 2007).

> Fifth, what is the relevance of El-Hadad's Egyptian nationality on the facts of this case?[143]

The *El-Hadad* court's reliance on the nature of the plaintiff's employment as opposed to its purpose, even in this context, is apparent.[144] Ultimately, the court held that the plaintiff was not a civil servant and his employment contract was commercial in nature, and the U.A.E. was held accountable for its breach.[145]

C. Additional U.S. Law Providing State Immunity

Prior to enactment of the FSIA, Congress passed the International Organizations Immunities Act ("IOIA").[146] The statute granted international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[147] At the time the statute entered into force, the immunities extended to foreign governments by the United States were absolute.[148] The FSIA, as described in great detail *infra*, restricted this immunity.[149]

The U.S. Supreme Court has not yet ruled on the scope of immunity offered to intergovernmental organizations ("IGOs") under the IOIA. However, in a 2008 appellate case, *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, the Circuit Court for the District of Columbia held the immunity still to be absolute.[150] As a result, there are no exceptions for commercial activity, etc.[151] The only available exception is achieved through the organization's express waiver.[152] International and national law governing immunity for international organizations requires that the language of such a waiver not be broad on its face and be narrowly construed, and must further the organization's objectives in entering the contract or agreement in which the waiver is found.[153]

---

143 *Id.*
144 *See id.* at 667.
145 *Id.* at 668.
146 22 U.S.C. §§ 288–288k (2000 & Supp. 2005).
147 22 U.S.C. 288a(b) (2000).
148 *See infra* Part III.A.
149 *See infra* Part III.B.
150 264 Fed. App'x 13, 15 (D.C. Cir. 2008).
151 *Id.*
152 *Id.*
153 *Id.*

Executive Order 9698 contains an extensive list of international organizations entitled to enjoy the absolute immunity of the IOIA.[154] A number of space-related organizations can be found on the list, to wit, the European Space Research Organization (succeeded by the European Space Agency), the International Telecommunication Union, the International Telecommunications Satellite Organization, and the United Nations.[155] Additionally, the ICAO, the United International Bureau for the Protection of Intellectual Property, and the World Intellectual Property Organization are listed.[156] An organization should properly word express waivers of immunity in P3 agreements involving listed IGOs, taking into account that it must receive some benefit for the immunities it releases.

Several other laws in the United States deal with bringing suit against the federal government in a U.S. court. As lawsuits are possible in light of the U.S. policy to employ more entities along the public-private spectrum, the laws bear mention. First is the Tucker Act, in which the United States waives its immunity against suit for actions arising out of express or implied contracts with the government or one of its agencies.[157] Claims may be for constitutional violations or "for liquidated or unliquidated damages in cases not sounding in tort."[158] Tort claims are excluded under this Act.[159] "The Tucker Act waives sovereign immunity and allows the Court of Federal Claims to hear certain suits against the Government."[160] Claims for less than $10,000 fall under the Little Tucker Act; concurrent jurisdiction is available in either federal district court or the Court of Federal Claims.[161]

Since space business involves considerable interdependence between the military and the private sector (falling closer to the

---

[154] Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946), *amended by* Exec. Order No. 10,083, 14 Fed. Reg. 6161 (Oct. 10, 1949); Exec. Order No. 10,533, 19 Fed. Reg. 3289 (June 3, 1954).

[155] U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL, EXHIBIT 1 (2007), *available at* http://www.state.gov/documents/organization/87183.pdf.

[156] *Id.*

[157] *See* 28 U.S.C. § 1491(a)(1) (2000).

[158] *Id.*

[159] *See id.*

[160] L-3 Commc'ns Integrated Sys., L.P. v. United States, 79 Fed. Cl. 453, 460 (2007). Interestingly, the Principal Deputy Secretary of the Air Force, whose conviction for violating conflict of interest laws led to the suit against the United States, was responsible for the largest P3 in U.S. Air Force history, worth $10.1 billion. *Id.* at 457.

[161] 28 U.S.C. § 1346(a)(2).

center of the public-private continuum), litigation involving contracts between the military and private contractors can be instructive. In *Department of the Army v. Blue Fox, Inc.*, a government subcontractor on a construction project sued the Army and the Small Business Administration seeking an equitable lien on property jointly held which had been distributed to the primary contractor who had failed to pay the subcontractor.[162] The Army had not required a Miller Act bond,[163] which requires a contractor on a federal project to post a performance bond and a labor and material payment bond.[164] The bonds cover first-tier claimants, or primary contractors, and their subcontractors.[165] Claimants further down the chain, however, are "considered too remote and cannot assert a claim."[166] And, as Blue Fox, Inc. learned, with no bond, there is no possible recovery because sovereign immunity bars liens on government property.[167]

Lastly, the Federal Tort Claims Act ("FTCA") permits private parties to bring an action in federal court against the United States for most torts committed by persons acting on behalf of the United States.[168] Exceptions to the FTCA include the *Feres* doctrine, prohibiting suit by military personnel for injuries sustained incident to service;[169] the discretionary function exception, .immunizing the United States for acts or omissions involving policy decisions;[170] and the intentional tort exception, unless the offending acts were committed by federal law enforcement or investigative personnel.[171] Pertinent to discussion of immunity in the context of space-related P3s is *Smith v. United States*, as it dealt with a tort claim that arose in Antarctica, a region of indeterminate status in international law.[172] Although the FTCA contemplates extra-territorial claims, the issue was whether a sovereignless region constituted a foreign country for

---

[162] 525 U.S. 255, 256–57 (1999).

[163] *Id.*

[164] 40 U.S.C. § 3131(b) (2000 & Supp. 2005).

[165] Surety Info. Office, The Miller Act, http://www.sio.org/html/miller.html (last visited Oct. 30, 2008).

[166] *Id.*

[167] *Blue Fox*, 525 U.S. at 265.

[168] *See* 28 U.S.C. § 1346(b) (2000); 28 U.S.C. §§ 2671–2680 (2000).

[169] Feres v. United States, 340 U.S. 135, 146 (1950).

[170] 28 U.S.C. § 2680(a).

[171] *Id.* § 2680(h).

[172] 507 U.S. 197, 198 (1993).

the purposes of applying the FTCA.[173] The Court held that it did not,[174] leading to the conclusion by analogy that a plaintiff injured from an event occurring in outer space caused by the negligence of the United States would not be able to sue a government partner under the FTCA.

D. Eleventh Amendment Immunity

The Eleventh Amendment of the U.S. Constitution removes a class of cases from Article III jurisdiction, which established the judiciary and the federal court system.[175] The first case heard by the U.S. Supreme Court involving the claim of a private individual against a state was *Chisholm v. Georgia*,[176] in which a citizen of South Carolina brought an action against the state of Georgia on a contractual debt and Georgia refused to appear.[177] The Court, based on Article III, asserted jurisdiction and heard the case.[178] This decision was quickly upended one year later when Congress passed the Eleventh Amendment, removing the possibility of suit by private citizen against a state from the bailiwick of the federal courts.[179]

The text of the amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[180] On its face, the amendment merely withholds jurisdiction based upon citizen-state diversity; however, the judicial reach has been extended through subsequent Supreme Court decisions.[181] One such case was *Hans v. Louisiana*, holding that Eleventh Amendment immunity shields states from suits brought by their own citizens.[182] "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sov-

---

[173] *Id.* at 199–200.

[174] *Id.* at 204.

[175] U.S. Const. amend. XI.

[176] 2 U.S. 419 (1793).

[177] Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 529 (2003).

[178] *Id.*

[179] *Id.* at 530.

[180] U.S. Const. amend. XI.

[181] *See, e.g.*, Durning v. Citibank, N.A., 950 F.2d 1419, 1422–23 (9th Cir. 1991).

[182] 134 U.S. 1, 21 (1890).

ereign immunity. It thus accords the States the respect owed them as members of the federation."[183]

This shield was extended to agencies of the state in *State Highway Commission v. Utah Construction Co.*[184] Despite the breadth of the amendment's reach, some state-created and/or state-managed entities are not immune. The jurisprudence that has developed analyzes a number of structural factors in order to determine an entity's immunity or vulnerability to suit. In light of the many and varied entities that have emerged in the trend away from the purely public end of the spectrum, however, courts have encountered difficulty in consistently applying these multi-factoral tests. Also, different jurisdictions develop their own doctrines based upon *stare decisis*; sister court decisions can instruct or persuade but, of course, do not bind. However, as these entities represent different degrees of state involvement, and often include P3s, the cases are instructive for our purposes. And, in the absence of binding precedent in the space realm either in the United States or internationally, certain features of these hybrid entities will lend themselves well to our extrapolation.

The arm-of-the-state doctrine appears in connection with three basic entities: (i) a political subdivision, such as a city, county, or municipality; (ii) an entity established by two or more states by congressionally-approved compact; and (iii) a special purpose public corporation or agency established by or for the state.[185] The first is not entitled to Eleventh Amendment immunity; some forms of the other two are.[186] Understanding the purpose of the immunity assists in the analysis required to determine whether an entity of the second or third type can avoid suit and ultimately, liability. "[I]t is not just the state's interest in its public treasury which is at stake in the assertion of Eleventh Amendment immunity. The state also has a 'dignity' interest as a sovereign in not being hauled into federal court."[187] The importance of dignity to states was stressed in a recent U.S. Supreme Court decision:

---

[183] P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citations omitted).

[184] 278 U.S. 194, 199 (1929).

[185] Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 61 (1st Cir. 2003).

[186] *See id.*

[187] *Id.* at 63.

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'"[188]

The influence of state dignity in practical matters, such as immunity from suit and freedom from federal intervention, long has been a source of contention in the United States.[189] When the state creates an entity without clear demarcation of its roles and responsibilities, it becomes difficult for courts to assess the entity's status.[190] At the same time, since many public functions and services are delegated to state-created entities falling closer to the private end of the spectrum, it is doubtful that all these entities were meant to enjoy the state's immunity from suit.

The arm-of-the-state test generally includes a combination of five of the following eight factors: (1) whether a money judgment would be satisfied out of state funds or could be satisfied without direct participation or guarantees from the state; (2) the source of the entity's funding; (3) whether the entity performs central government functions or has a proprietary function; (4) whether the entity may sue or be sued and enter into contracts in its own name and right; (5) whether the entity has the power to take the property in its own name or only in the name of the state and whether that property is subject to taxation; (6) whether the state exerts control over the agency, and if so, to what extent; (7) whether the state has immunized itself from responsibility for the agency's acts or omissions; and (8) the corporate status of the entity.[191]

These factors are considered in evaluation of the nexus between an entity and the state to discriminate between governmental entities. Of these factors, the source of the entity's funding is considered the weightiest.[192] However, it is important

---

[188] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (citations omitted).

[189] For a marvelous treatment of the historical roots of state dignity, see Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003).

[190] Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1251–52 (1992).

[191] *See* Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1147 (9th Cir. 2004); *Fresenius*, 322 F.3d at 62.

[192] Barron v. Deloitte & Touche, L.L.P., 381 F.3d 438, 440 (5th Cir. 2004).

to recognize that these factors are not intended to impute arm-of-the-state status to private entities.[193] This point was recently made by the U.S. Court of Appeals for the Ninth Circuit, in a case where a private company claimed state immunity from a suit arising from services it provided to the district attorney.[194] Contractors do not receive immunity.[195] The fact that a private company performs a central governmental function is not enough alone to grant state immunity, nor can immunity be extended to private companies as arms of the state.[196]

While independent contractors cannot, per se, claim immunity from suit arising out of work done for the state, there are situations when a contractor can "acquire" immunity. This exception "provides that a contractor [that] performs its work . . . with a governmental agency, and under the governmental agency's direct supervision, is not liable for damages resulting from its performance."[197] A contractor would not be protected for its negligence, only for acts done in accordance with its contract with the state.[198] Some states call this "derivative sovereign immunity."[199]

Also important to the arm-of-the-state analysis is recognition of bi-state entities, creations of three sovereigns—two separate states and the federal government. These bodies are governed by compact agreements between the states (or between a state and an Indian tribe), with congressional consent.[200] Typically, these Compact Clause entities fall outside the range of Eleventh Amendment immunity, as that immunity is "only available to 'one of the United States.'"[201]

---

193 *See* Del Campo v. Kennedy, 517 F.3d 1070, 1077 (9th Cir. 2008).

194 *Id.* at 1072.

195 *Id.* at 1078. Of note, the government contractor defense to the FTCA is a different thing entirely. There, a contractor of the federal government can claim immunity from torts committed if the contractor was following specifications given by the government, similar to the acquired immunity doctrine. *See Ali*, 355 F.3d at 1146.

196 *See Del Campo*, 517 F.3d at 1078.

197 Lopez v. Mendez, 432 F.3d 829, 833 (8th Cir. 2005).

198 *Id.*

199 *See, e.g.*, McMahon v. Presidential Airways, Inc. 502 F.3d 1331, 1343 (11th Cir. 2007); GLF Constr. Corp. v. LAN/STV, 414 F.3d 553, 554 (5th Cir. 2005); Butters v. Vance Int'l., Inc. 225 F.3d 462, 466 (4th Cir. 2000); Hilbert v. Aeroquip, Inc., 486 F. Supp. 2d 135, 137 (D. Mass. 2007); Taylor v. Comsat Corp., No. 2:05-0920, 2006 WL 3246508, at *2 (S.D. W. Va. Nov. 8, 2006).

200 *See Interstate Compacts as a Means of Settling Disputes Between States* 35 HARV. L. REV. 322, 322–26 (1922).

201 Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 43 (1994).

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court was faced with the issue of whether a bi-state entity could qualify for Eleventh Amendment immunity.[202] The case involved the Tahoe Regional Planning Agency ("TRPA"), created by compact between California and Nevada and approved by Congress.[203] The Court held that a Compact Clause agency presumably was not qualified for Eleventh Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose."[204] The *Lake Country* court found that the TRPA did not meet the requirements such that immunity could inure.[205]

In *Hess v. Port Authority Trans-Hudson Corp.*, the Supreme Court again was confronted with the issue.[206] Injured railroad workers brought separate suits against PATH, a commuter rail system connecting New York and New Jersey.[207] Along the procedural path, the cases were consolidated.[208] PATH moved to dismiss, asserting, *inter alia*, Eleventh Amendment immunity.[209]

The Court evaluated the bi-state compact at issue and found that neither it, nor its implementing legislation, categorized PATH as a state agency, and that parts of its governance were local while other parts were controlled by each state.[210] More telling was that the two states involved lacked any financial responsibility for PATH and bore no legal liability for its debts.[211] Neither state alone could control the entity.[212] Faced with conflict in its analytic results, the Court stated, "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being [dignity and financial solvency] remain our prime guide."[213] That said, PATH's financial self-

---

202 440 U.S. 391, 393 (1979).

203 *Id.*

204 *Id.* at 401.

205 *Id.* at 402.

206 513 U.S. 30 (1994).

207 *Id.* at 33.

208 *Id.* at 35.

209 *Id.* at 33.

210 *Id.* at 44–45.

211 *Id.* at 45.

212 *Id.* at 47.

213 *Id.*

sufficiency tipped the balance in favor of no immunity and PATH was left to answer its injured workers' claims in court.[214]

The following analysis of cases, while not exhaustive, shows that U.S. courts hesitate to find entities arms of the state, and therefore beyond the reach of an action for damages.

Style of Case	Entity	State Arm?	Immune?
Lopez v. Mendez[215]	Highway construction contractor	No	No
Fresenius[216]	Hospital	No	No
Lees v. TSAC[217]	Non-profit administering student loans	No	No
GLF v. LAN/STV[218]	Engineering consultant	No	Yes
Durning v. Citibank[219]	Wyoming Community Development Authority	No	No
Hess v. PATH[220]	Bi-state commuter rail system	No	No
Justus v. Kellogg Brown & Root Services, Inc.[221]	Engineering contractor	No	No
Rosario v. American Corrective Counseling Serv.[222]	Private, for profit operator of bad check restitution company contracting with state attorney	No	No
Barron v. Deloitte & Touche, L.L.P.[223]	State's Medicaid fiscal intermediary	No	No
Takle v. Univ. of Wisc. Hospital Clinics[224]	Hospital	No	No

Clearly, extension of immunity requires far more than pleading it. Axiomatic, too, is the fact that parties who successfully

---

214 *Id.* at 52.

215 Lopez v. Mendez, 432 F.3d 829 (8th Cir. 2005).

216 Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56 (1st Cir. 2003).

217 *In re* Lees, 264 B.R. 884 (W.D. Tenn. 2001).

218 GLF Constr. Corp. v. LAN/STV, 414 F.3d 553 (5th Cir. 2005).

219 Durning v. Citibank, N.A., 950 F.2d 1419 (9th Cir. 1991).

220 Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

221 Justus v. Kellogg Brown & Root Servs., Inc., 373 F.Supp. 2d 608 (W.D. Va. 2005).

222 Rosario v. Amer. Corrective Counseling Servs., Inc., 506 F.3d 1039 (11th Cir. 2007).

223 Barron v. Deloitte & Touche, L.L.P., 381 F.3d 438 (5th Cir. 2004).

224 Takle v. Univ. of Wis. Hosp. & Clinics Auth., 402 F.3d 768 (7th Cir. 2005).

plead immunity avoid the litigation that could result in a published opinion.

Another case reveals an organizational structure resembling a P3, in the context of a taking. The analysis of whether the organization was a part of the state is useful. In *Illinois Clean Energy Community Foundation v. Filan*, the legislatively-created foundation enjoined the state from enforcing a demand for its assets on the grounds that it would be a taking.[225] The state countered with the argument that the foundation was, in essence, the state, and therefore could not complain about the state taking its own property.[226] Additionally, the state argued that it could amend the statute creating the foundation to allow for the transfer of title.[227] The court quickly disposed of that argument noting that the state lawfully cannot enlarge its regulatory power to allow the taking of someone's property through amendment of an existing statute, but only through enactment of a new one.[228] More telling was the court's holding that "[t]he fact that the state legislature authorized the creation of the plaintiff foundation does not make the foundation a state agency."[229]

IV. APPLYING THE TESTS TO P3S

Now it is time to apply the different doctrines that allow or deny immunity to the hybrid entities that are evolving in the space industry. "[E]ach [P3] is *sui generis*, and consequently . . . no body of law or regulations . . . applies to all [P3] contractual arrangements."[230] The decision of how to apply the various immunity tests to P3s becomes more difficult the closer one finds the entity at issue to the middle of the continuum. A purely commercial activity carried out by a foreign state can be denied immunity. On the other hand, an independent contractor following his contract to the letter can enjoy immunity.

"[T]he most important factors to consider in deciding whether a hybrid entity is the state for purposes of sovereign immunity are the extent of state control and whether the entity was acting as the state's agent in conducting the activity that

---

225 392 F.3d 934, 935 (7th Cir. 2004).

226 *Id.* at 936.

227 *Id.*

228 *Id.*

229 *Id.*

230 Cook, *supra* note 10, at 1.

gave rise to the suit."[231] U.S. courts are "extremely hesitant to extend this fundamental and carefully limited immunity to private parties whose only relationship to the sovereign is by contract."[232] This is not necessarily a bad thing. The commercial exception in restrictive foreign state immunity was adopted primarily because it leveled the playing field in a world where governments were behaving increasingly as ordinary trade partners. At this point in history, governments actually are trade partners.

What becomes apparent when looking at both domestic and international law is that immunity does not extend in the face of clear, unambiguous waiver and obvious commercial activities. A P3 in the United States, coalescing private interests with a government partner, requires use of the arm-of-the-state test. How is the deal structured? What is the source of funding? Who will have to pay a judgment—the entity or the government? Are the roles clearly defined? Are the risks spread equitably and transparently? Is the service provided governmental or proprietary? Already, telecommunications infrastructure widely has been recognized as a public service.[233] Earth observation, the internet, and military communication illustrate delivery of public services through private means. And, with a foreign partner, the nature v. purpose test will apply.

As noted earlier, it appears nearly impossible for a privatized concern to avoid suit under the auspices of the state, and is only possible for a hybrid concern if the factors, considered together, render immunity inappropriate. In actions against states or their entities within the United States, the inquiry is whether the entity is an arm of the state. Internationally, the inquiry will focus on whether (i) the entity is an instrumentality or organ of the state, (ii) the P3's activity is commercial in nature, and if so, where it occurred; and (iii) the activity from which the action arose was an action of state.

The locus of the commercial activity is significant. In a P3, there is potential for a private partner with a foreign government to be at a disadvantage in a U.S. court. It is important to make sure that there is direct effect in the United States if the P3 will be operating extraterritorially. An indirect effect, such as a decline in stock price if a deal does not go through, would not

---

[231] Takle v. Univ. of Wis. Hosp. & Clinics Auth., 402 F.3d 768, 772 (7th Cir. 2005).

[232] Del Campo v. Kennedy, 517 F.3d 1070, 1076 (9th Cir. 2008).

[233] J.P. SINGH, LEAPFROGGING DEVELOPMENT: THE POLITICAL ECONOMY OF TELECOMMUNICATIONS RESTRUCTURING 19 (1999).

qualify. Fraudulent activity in connection with a U.S. bank account would. A claim based upon a bid, won or lost, for work to be performed outside the United States would not.

V. RECOMMENDATIONS

P3s are based upon contractual agreements. In structuring the special purpose vehicles and joint venture agreements, care in drafting and, possibly, standardization of contracts are tools for keeping arrangements transparent. P3s are most successful when they survive long enough to realize the returns. Six guiding principles have been identified for the sustainability of P3s in infrastructure contexts that can easily be applied when creating space-related ventures.[234] They are 1) design the project to deliver a balanced risk profile between the public and private partners; 2) win the commitment of critical stakeholders and operators; 3) develop a strong contract setting forth the rules of the game and clearly defining roles and responsibilities; 4) drive the bidding program allowing buy-in at all levels and stages of the process; 5) demonstrate improved service delivery; and 6) sustain change.[235] Independent advisors have been recognized as useful in structuring P3 transactions to ensure the proper balance between public and private interests.[236] Transparency is a key issue.

Ultimately, the viability of P3s comes down to principles of equity and fair dealing, fairness and natural justice, and due process, both substantive and procedural. The restrictive theory of immunity was adopted by sovereign states in recognition of the practical realities of business and government in the twentieth century, and in an effort to reduce legal maneuvering to avoid responsibility. These realities have solidified in the beginning of the twenty-first century. It is safe to conclude that the restrictive theory of state immunity has achieved the status of customary international law, for it is followed by a majority of the international community.

It is important to address these realities in the early stages of a project. P3s make public services available to more users when done efficiently. The private sector has a better track record. Efficient delivery to more end-users really is an issue of freedom

---

[234] Cledan Mandri-Perrott, *Six Guiding Principles to Achieve Sustainable PPP Arrangements* (2005), http://www.ip3.org/pub/2005_publication_002.htm.

[235] *Id.*

[236] Jagun & Marques de Sa, *supra* note 9, at 3.

of access, found both in space treaties[237] and in customary international law; limited not only to space but also to its benefits for all on "Spaceship Earth."[238] If both sides of the spectrum proactively acknowledge the exposures and fairly apportion the risks, then the synergy created by P3s is an awesome resource available to all.

Clearly, the framers of the early space treaties contemplated space activities for both the public and private sectors.[239] It is a natural development that these activities have evolved to include formalized cooperation—not just between states—but between states and private entities. However, even with the lofty principles of the treaties and the notion of fairness as a cornerstone to guide space actors, it is wise to address the reality that not all participants will play fair. For this reason, it is recommended that the claims arising from space-related P3s be resolved on the basis of private law, where decisions are binding and relief and enforcement possible. Government immunity does not have to upset the balance between partners in a P3. All that is required is clarity, transparency, and good planning.

---

[237] *See, e.g.*, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

[238] R. BUCKMINSTER FULLER, OPERATING MANUAL FOR SPACESHIP EARTH 115 (1968).

[239] Outer Space Treaty, *supra* note 237, art. VI.


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS