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## DOT's Show Cause Order 86-1-38: A Case Study of An Overzealous Government Effort to Expand United States Jurisdiction over Foreign Air Carriers

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**DOT'S SHOW CAUSE ORDER 86-1-38: A CASE  
STUDY OF AN OVERZEALOUS GOVERNMENT  
EFFORT TO EXPAND UNITED STATES  
JURISDICTION OVER FOREIGN AIR  
CARRIERS**

ROY J. RAFOLS\*

**INTRODUCTION**

**O**N DECEMBER 4, 1984, Kuwait Airways Flight 221 from Kuwait City, Kuwait to Karachi, Pakistan was hijacked over international waters by a group of men armed with hand grenades and pistols. Aboard Flight 221 were, among others, Mr. Charles F. Hegna and Mr. William L. Stanford. Both were American citizens employed by the Agency for International Development ("AID") of the United States Department of State. The hijackers forced the Kuwait Airways' airplane to land at Teheran, Iran where Messrs. Hegna and Stanford were killed by the hijackers.<sup>1</sup>

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<sup>1</sup> Motion of Lorraine P. Stanford, Executrix, and Edwena R. Hegna, Executrix, to Revoke or Suspend the Exemption of Kuwait Airways Corporation at 8, Application of Kuwait Airways Corporation for an Exemption from Section 402 of the

At the time of the hijacking, Messrs. Hegna and Stanford were travelling by order of the United States on diplomatic passports, fulfilling their duties to supervise the auditing of various AID transactions with Middle Eastern nations. Messrs. Hegna and Stanford acquired their tickets from Northwest Orient and Pan American World Airways, both United States carriers. The tickets were issued (in exchange for United States travel receipts) on AID premises in Sanaa, Yemen and Karachi, Pakistan. Kuwait Airways was the carrier for a portion of both men's trips pursuant to Kuwait Airways' participation in an Interline Traffic Passenger Agreement ("Agreement") with Pan American. The Agreement allowed the United States carrier to issue tickets for transportation over the routes of Kuwait Airways and provided for a division of the fares received.<sup>2</sup>

On January 18, 1985, Lorraine P. Stanford, as executrix of William L. Stanford's estate, sued Kuwait Airways in the United States District Court for the Southern District of New York seeking damages for alleged acts and omissions of Kuwait Airways in connection with her husband's death. Edwena Hegna, as executrix of Charles F. Hegna's estate, filed a similar lawsuit on March 29, 1985, in the same court. Relying on two arguments, Kuwait Airways filed motions to dismiss in both actions.<sup>3</sup> First, Kuwait Airways contended that article 28(1) of the Warsaw Convention ("Convention")<sup>4</sup> precludes United States Government employees injured or killed while travelling abroad on foreign carriers from bringing suit in the United States against the foreign air carrier. Article 28(1) operates, moreover, notwithstanding that the individuals were on

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Federal Aviation Act of 1958, as amended (No. 38,066) (Department of Transportation, June 7, 1985) [hereinafter cited as Plaintiffs' Motion].

<sup>2</sup> *Id.* at 8-9.

<sup>3</sup> *Id.* at 10. Kuwait Airways filed motions to dismiss for lack of subject matter jurisdiction. *Id.*

<sup>4</sup> Convention for the Unification of Certain Rules relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.I.A.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1982) [hereinafter cited as Warsaw Convention].

official United States Government business when they were killed, and the foreign carrier had a place of business in the United States and operated air services to the United States under and pursuant to Civil Aeronautics Board ("CAB") authority. Second, Kuwait Airways asserted that, as an instrumentality of a foreign sovereign, it was immune from suit in United States courts under the provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA").<sup>5</sup> Specifically, Kuwait Airways maintained that although the exemption authority by which the CAB authorized Kuwait Airways to operate to and from the United States provides for waivers of sovereign immunity, that waiver relates only to actions "based upon any claim arising out of operations" pursuant to the exemption.<sup>6</sup> Because Kuwait Airways' operations in the Middle East, out of which the two actions arose, were not operations to and from the United States, under the exemption the waiver of sovereign immunity did not apply.<sup>7</sup>

In response to these two defenses, Lorraine P. Stanford and Edwena Hegna filed a motion with the Department of Transportation ("DOT") to apprise the DOT of Kuwait Airways' defenses and to seek revocation or suspension of the exemption authority granted by the CAB to Kuwait Airways.<sup>8</sup> Alternatively, the plaintiffs requested that the DOT modify the exemption.<sup>9</sup> Stanford and Hegna believed that a modification of the exemption was needed in order to guard the public's safety and to ensure that American passengers, who travel on foreign airlines that do business in the United States, have access to American courts.<sup>10</sup>

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<sup>5</sup> 28 U.S.C. §§ 1602-11 (1982).

<sup>6</sup> See Plaintiffs' Motion, *supra* note 1, at 28. For the entire text of the waiver which the United States generally grants to foreign carriers, see *infra* text accompanying note 16.

<sup>7</sup> See Plaintiffs' Motion, *supra* note 1, at 28.

<sup>8</sup> See *id.* at 1, 37.

<sup>9</sup> *Id.* at 38.

<sup>10</sup> *Id.* Specifically, the motion asked the CAB "to modify the exemption granted to Kuwait Airways in order to guard the safety and rights of the public, and to

On January 21, 1986, the DOT issued a Show Cause Order<sup>11</sup> directing all interested persons to show cause why the DOT should not amend all foreign airline operating authority.<sup>12</sup> The proposed amendment would clarify that the required waiver of sovereign immunity extends to all the air service operations of a foreign carrier, regardless of whether those activities take place within foreign air transportation as defined in the Federal Aviation Act.<sup>13</sup> Further, the "proposed action" supposedly only clarifies the scope of a condition currently imposed on foreign air carriers' operations.<sup>14</sup> The DOT contends that its proposal is not intended to affect any other aspect of a foreign airline's operations, including the airline's right to raise jurisdictional arguments and other legal defenses.<sup>15</sup>

Under current practices every foreign air carrier that operates to or from the United States is required, as part of its section 402 foreign air carrier permit (or, as here, its exemption authority), to waive the defense of sovereign immunity under the following express terms:

[The holder shall] [w]aive any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against it in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations under this [permit or exemption].<sup>16</sup>

The DOT fears this exact wording makes it possible to argue that the CAB intended to limit the waiver to claims arising out of a carrier's operations to and from the

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ensure access to our Nation's courts for American citizens who travel on foreign airlines that do business in the United States." *Id.*

<sup>11</sup> Order to Show Cause, Amendment of Foreign Air Carrier Permit and Exemption Authority, Department of Transportation, No. 43,742 (proposed Jan. 21, 1986) [hereinafter cited as Show Cause Order].

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* See Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301-1542 (1982). For the Federal Aviation Act's definition of "overseas air commerce" or "foreign air commerce," see *infra* note 28.

<sup>14</sup> Show Cause Order, *supra* note 11, at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2 & n.3 (citing DOT orders 85-11-5, 85-9-15, 85-9-21, 85-9-22).

United States.<sup>17</sup> The DOT asserts that such a narrow interpretation would be contrary to the CAB's intent.<sup>18</sup> The CAB specifically intended foreign carriers, like domestic air carriers, to have no sovereign immunity defense.<sup>19</sup> Therefore, the DOT proposes to amend the standard waiver conditions to read as follows:

[The holder shall] [w]aive any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against it in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations *by the holder of this* [permit or exemption].<sup>20</sup>

This paper will address the following reasons why the proposed action by the DOT is unlawful. First, the present waiver is clear and does not require any "clarification." Second, the proposed action exceeds the scope of the DOT's authority. Third, the proposal is contrary to the avowed United States public policy as expressed in the FSIA. Finally, the proposed action will run counter to constitutional safeguards enunciated by United States courts.

## I. THE PRESENT WAIVER IS CLEAR AND DOES NOT REQUIRE ANY CLARIFICATION

As previously stated, the DOT contends that the proposed action merely clarifies the scope of the current waiver.<sup>21</sup> Presumably, the DOT fears that "the exact words of the condition make it possible to argue that the

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<sup>17</sup> Show Cause Order, *supra* note 11, at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The Show Cause Order quoted "El-Al" Israel Airlines Ltd., 14 C.A.B. 962 (1951). In *El-Al* the CAB stated: "As a matter of policy . . . proper protection of shippers and the traveling public require that insofar as practicable a foreign air carrier shall not enjoy immunity from suit any more than does a domestic carrier." *El-Al*, 14 C.A.B. at 964.

<sup>20</sup> Show Cause Order, *supra* note 11, at 5 (emphasis added to indicate proposed change).

<sup>21</sup> *Id.* at 1. In its show cause order the DOT stated: "The proposed action is limited to clarifying the scope of a condition currently imposed on the operations of foreign air carriers, and is not intended to affect any other aspect of a foreign

CAB intended that the waiver should be limited to claims arising out of a carrier's operations to and from the United States made possible as a result of the permit or exemption."<sup>22</sup> Contrary to the DOT's view, the present waiver needs no clarification. The language of the present waiver unequivocally states that the waiver applies only to claims arising out of operations under the permit or exemption, that is, to claims arising under air transport activities in the United States.<sup>23</sup>

Such a "narrow" construction finds support in the records of the CAB hearing in which the present waiver was adopted. In that hearing, counsel for the CAB Bureau of Air Operations, V. Rock Grundman, Esq., clarified the scope of the waiver:

Q. Now . . . undoubtedly a question might arise as to immunity from suit of the Israel El Al, as a government agency, on any matters arising in the United States, and we, in such cases, have been asking every airline recently, within the last year, I would say, whether or not it would accept a condition in its permit to the effect that the carrier will accept jurisdiction of the courts of the United States *in connection with matters arising out of its air transport activities in the United States.*

In other words, that in the ordinary commercial activities it would not claim immunity from suit because of the governmental character of its ownership.

Are you in a position to state whether or not El Al will accept such a condition in its permit?

A. Well, I am afraid that I would have to refer this matter to headquarters but I would assume that El Al would be ready to sign an admission like this.

Q. The point is, such a defense has been raised in the case of one international airline and inasmuch as it is just a purely commercial activity it would seem it would be reasonable it should be subject to suits in the ordinary course

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carrier's operations, including its right to raise other legal defenses, such as jurisdictional arguments." *Id.*

<sup>22</sup> *Id.* at 2.

<sup>23</sup> See *supra* note 16 and accompanying text.

of events in matters arising in the United States — just a waiver of that one defense.<sup>24</sup>

The CAB wanted, and El Al agreed, to waive sovereign immunity “in connection with matters arising out of its air transport activities in the United States,”<sup>25</sup> or, as reiterated, “in matters arising in the United States.”<sup>26</sup> Even if the waiver can be interpreted broadly to include all El Al’s “air transportation” activities, including its “foreign air transportation” activities, the waiver still would not contemplate an extension to *all* El Al operations everywhere in the world. Thus, for example, the waiver clearly did not contemplate allowing suit in United States court by an Israeli national ticketed only, and then injured, on an El Al flight between Tel Aviv and Athens. Nor did the waiver necessarily contemplate requiring El Al to waive its immunity even for a United States citizen if, for example, the United States citizen was ticketed only, and then injured, on an El Al flight between Paris and Tel Aviv.

## II. THE PROPOSED ACTION EXCEEDS THE SCOPE OF THE DOT’S AUTHORITY

First, the proposed action exceeds the DOT’s authority to regulate foreign air transportation. The Federal Aviation Act of 1958<sup>27</sup> (“Act”) defines “foreign air commerce” or “overseas commerce” as carriage by aircraft of persons or property in commerce for compensation between a place in the United States and any place outside the United States.<sup>28</sup> By its proposed action the DOT seeks to

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<sup>24</sup> Record at 35-36, “El-Al” Israel Airlines Ltd., 14 C.A.B. 962 (1951) (emphasis added).

<sup>25</sup> *Id.* at 35.

<sup>26</sup> *Id.*

<sup>27</sup> 49 U.S.C. app. §§ 1301-1542 (1982).

<sup>28</sup> *Id.* § 1301(23)(c). This section states:

“[O]verseas air commerce”, and “foreign air commerce” . . . mean the carriage by aircraft of persons and property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between . . . a place in the United States and any place outside thereof. . . .



clarify that foreign air carriers may not seek sovereign immunity in United States tribunals for their air service activities, regardless of whether those activities took place within or outside foreign air transportation.<sup>29</sup> Clearly, the DOT's proposed action which seeks to regulate air transportation having no nexus with the United States is beyond the scope of the DOT's statutory authority. However laudable the DOT's proposal, the DOT, like its predecessor the CAB, was created by Congress, and the "determinative question" is what Congress has said the DOT can do rather than what the DOT thinks it should do.<sup>30</sup>

Second, the proposed action exceeds the scope of the DOT's authority because the proposed action is inconsistent with the treaty obligations of the United States under the Warsaw Convention.<sup>31</sup> Specifically, the proposed action is inconsistent with article 28(1) of the Warsaw Convention as the proposal seeks, in effect, a unilateral expansion of the permissible jurisdictions under which suit may be brought against a foreign air carrier. Under the proposed action a foreign air carrier may be sued in a United States court even if the claimant, as in the case of Hegna and Stanford, purchased his ticket abroad and his ticketed transportation was between two foreign points.<sup>32</sup>

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*Id.*

<sup>29</sup> Show Cause Order, *supra* note 11, at 5.

<sup>30</sup> See *Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961). The Court stated: "[The Civil Aeronautics Board] is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *Id.*

<sup>31</sup> See generally Warsaw Convention, *supra* note 4. The Federal Aviation Act requires that

[i]n exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

49 U.S.C. app. § 1502 (1982). Cf. *Trans World Airlines, Inc., v. Franklin Mint Corp.*, 446 U.S. 243, 276 n.5 (1984) (Stevens J., dissenting) ("[T]he powers delegated to the CAB, 49 U.S.C. § 1502, . . . must be exercised consistently with any convention in force, including the Warsaw Convention.").

<sup>32</sup> Show Cause Order, *supra* note 11, at 2.

In short, this is exactly the kind of suit not encompassed within the jurisdictional fora allowed by Warsaw's article 28.<sup>33</sup> Clearly, therefore, such a unilateral expansion by the DOT would run counter to the treaty obligations of the United States under the Warsaw Convention.

Finally, a proposal to expand the permissible jurisdictional fora under article 28 has been made under article XII of the 1971 Guatemala Protocol.<sup>34</sup> But, the United States Senate failed to ratify the Guatemala Protocol.<sup>35</sup> A mere agency, such as the DOT, cannot achieve on its own that which the Senate, in the treaty process, expressly rejected.

### III. THE PROPOSED ACTION IS CONTRARY TO THE AVOWED UNITED STATES PUBLIC POLICY AS EXPRESSED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

When Congress enacted the Foreign Sovereign Immu-

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<sup>33</sup> Warsaw Convention, *supra* note 4, art. 28(1). Article 28(1) provides: An action for damages must be brought, at the option of plaintiff, in the territory of one of the High Contracting Parties, either before the court of domicile of the carrier or of his principal place of business through which the contract has been made, or before the court at the place of destination. . . .

*Id.*

<sup>34</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol at the Hague on 28 September 1955, *opened for signature* Mar. 8, 1971, 10 I.L.M. 613 [hereinafter cited as Guatemala Protocol]. Article XII of the Guatemala Protocol states in part:

In Article 28 of the Convention the present paragraph 2 shall be renumbered as paragraph 3 and a new paragraph 2 shall be inserted as follows:

"2. In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the Same High Contracting party."

*Id.*

<sup>35</sup> 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983) (Senate vote declining to ratify Montreal Protocols which incorporate Guatemala Protocol).

nities Act of 1976,<sup>36</sup> Congress clearly expressed its legislative intent. First, Congress intended the FSIA to be the "sole and exclusive" standard for resolving sovereign immunity questions raised by foreign states before United States courts.<sup>37</sup> The DOT's proposed action will run counter to this legislative intent because the proposed action subjects a foreign air carrier's waiver of sovereign immunity to the DOT's own standards, not the standards set forth under the FSIA.

The DOT's show cause order clearly manifests that the DOT's standards run counter to those of the FSIA. In its show cause order the DOT states that its action "does not reflect any position on the propriety of asserting any other defense to which a foreign air carrier may be legally entitled, including jurisdictional defenses"<sup>38</sup> and that it is not "deciding whether the provisions of the Foreign Sovereign Immunities Act would otherwise exclude foreign air carriers from the general grant of sovereign immunity."<sup>39</sup>

The above-quoted statements clearly show the DOT's misunderstanding of the FSIA. The FSIA is a jurisdictional statute, and under section 1330 subject matter jurisdiction hinges on whether the foreign state is entitled to assert immunity under sections 1605 through 1607 or under any applicable international agreement.<sup>40</sup> One of

<sup>36</sup> 28 U.S.C. §§ 1602-11 (1982).

<sup>37</sup> H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6610 [hereinafter cited as House Report]. The House Report states:

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the *sole and exclusive standards to be used in resolving questions of sovereign immunity* raised by foreign states before Federal and State courts in the United States. It is *intended to preempt any other State or Federal law* (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities.

*Id.* (emphasis added).

<sup>38</sup> Show Cause Order, *supra* note 11, at 5.

<sup>39</sup> *Id.*

<sup>40</sup> Section 1330(a) of the FSIA provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for

the general exceptions under section 1605(a) of the FSIA is an explicit or implied waiver.<sup>41</sup> Thus, were a foreign air carrier to waive sovereign immunity as to *all* its operations, whether or not the basis of the action has any connection with the United States, the result may be more than a mere waiver of a "jurisdictional defense." The waiver could be construed as a submission by the foreign air carrier to the jurisdiction of the United States courts, even under circumstances in which the claim is based on facts having no connection with the United States.<sup>42</sup> Thus, contrary to the DOT's assertion, any such waiver almost certainly will bar the foreign air carrier from asserting any other jurisdictional defenses. In effect, and contrary to the DOT's avowals, a foreign air carrier executing, or being required to execute, the proposed waiver will not be on an equal footing with private entrepreneurs engaged in the same activities. Clearly, private entrepreneurs would be entitled to invoke the jurisdictional defense that a cause of action has an insufficient nexus with the United States, such that the action can not be brought in a United States court.

Second, the proposed show cause order is contrary to United States public policy as expressed in the FSIA because one of Congress' primary objectives in enacting the FSIA was to codify the restrictive theory of sovereign im-

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relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330 (1982).

<sup>41</sup> Section 1605(a) of the FSIA states in pertinent part:

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 in accordance with the terms of the waiver. . . .

28 U.S.C. § 1605(a)(1) (1982).

<sup>42</sup> See *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). The court stated: "Unlike the act of state doctrine, sovereign immunity is not merely a defense on the merits—it is jurisdictional in nature. If sovereign immunity exists, then the court lacks both personal and subject matter jurisdiction to hear the case and must enter an order of dismissal." *Id.* (citations omitted).

munity.<sup>43</sup> In order to achieve this, Congress placed the question of determining sovereign immunity entirely in the hands of the courts, as a matter of law, as opposed to an executive agency, as a matter of policy.<sup>44</sup> Thus, the Congress stated: "It is also designed to bring U.S. practice into conformity with that of most other nations by *leaving sovereign immunity decisions exclusively to the courts*, thereby discontinuing the practice of judicial deference to 'suggestions of immunity' from the executive branch."<sup>45</sup> The DOT's proposed action clearly runs counter to this policy because the proposal will cause the involvement and intervention of the DOT, an agency of the executive branch, on the question of sovereign immunity—the very thing Congress intended to discontinue.

Third, the DOT's action contradicts the FSIA's policy of deferring to the Warsaw Convention when the FSIA and the Convention conflict. Under the Warsaw Convention, a foreign air carrier may be sued only in the jurisdictions set out in article 28(1).<sup>46</sup> Thus, for all practical purposes, the Convention bestows on foreign air carriers immunity from jurisdiction in cases not covered by article 28(1).<sup>47</sup> Under the provisions of section 1330(a) of the

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<sup>43</sup> Under the restrictive theory of sovereign immunity, a sovereign is immune for its sovereign or public acts (*jure imperii*) but not for its private acts (*jure gestionis*). Letter of Acting Legal Adviser, Jack B. Tate, to the Department of Justice (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984 (1952).

<sup>44</sup> See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The Supreme Court stated:

In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R. REP. NO. 94-1487, p.7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.

*Id.*

<sup>45</sup> House Report, *supra* note 37, at 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, at 6610.

<sup>46</sup> For the text of article 28(1), see *supra* note 33.

<sup>47</sup> *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971). *Cf. McKenry, Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 216-18

FSIA, such immunity denies district courts subject matter jurisdiction over cases not covered by article 28(1).<sup>48</sup> Section 1604 of the FSIA restates this legislative intent:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.<sup>49</sup>

The legislative history of the FSIA clearly shows that article 28(1) of the Warsaw Convention takes precedence over any waiver of immunity contemplated under the FSIA: "All immunity provisions in sections 1604 through 1607 are made subject to 'existing' treaties and other international agreements to which the United States is a party. *In the event an international agreement expressly conflicts with this bill, the international agreement would control.*"<sup>50</sup> Thus, the DOT's proposal, which seeks to set aside the limitations on permissible jurisdiction contained in article 28(1) of the Warsaw Convention, runs counter to the legislative intent expressed in the FSIA that any international agreement to which the United States is a party shall take precedence on questions of immunity.

Lastly, the proposed action could result in a situation in which a foreign air carrier may be forced to defend itself in a United States court against a *foreign* plaintiff alleging a cause of action based on occurrences in a *foreign* country with absolutely *no connection* with the United States. The drafters of the FSIA considered, and clearly intended to avoid, such a situation. The drafters did not want the FSIA to turn United States courts into "small interna-

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(1963) (a court in a jurisdiction which does not fall within the contacts of article 28 will (or should) dismiss the action for lack of jurisdiction).

<sup>48</sup> See *Gayda v. LOT Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983) ("Because article 28 speaks to subject matter jurisdiction, it operates as an absolute bar to federal jurisdiction in cases falling outside its terms. . ."). See also *In re Korean Airlines Disaster of Sept. 1, 1983*, 19 Av. Cas. (CCH) 17,578 (D.D.C. 1985). For the text of section 1330(a), see *supra* note 40.

<sup>49</sup> 28 U.S.C. § 1604 (1982).

<sup>50</sup> House Report, *supra* note 37, at 27, reprinted in 1976 U.S. CODE. CONG. & ADMIN. NEWS, at 6616 (emphasis added).

tional courts of claims." Rather, Congress intended the FSIA only to cover disputes which have a relation to the United States.<sup>51</sup>

#### IV. THE PROPOSED ACTION WILL RUN COUNTER TO CONSTITUTIONAL SAFEGUARDS ENUNCIATED BY UNITED STATES COURTS

The DOT's proposed waiver assumes that the public interest, and U.S. international aviation policy, demand that foreign air carriers owned by foreign governments waive any claims they may otherwise enjoy to claim sovereign immunity in U.S. courts, whether or not the particular air service activity complained of takes place between the United States and some foreign place, or between two foreign places.<sup>52</sup>

The DOT apparently contemplates making government-owned foreign air carriers subject to the jurisdiction of United States courts regardless of whether the action has any United States nexus. This raises serious constitutional questions, particularly probable violations of the due process clause.

In his landmark decision in *International Shoe Co. v. Washington*,<sup>53</sup> Chief Justice Stone stated quite clearly that

due process requires that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts

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<sup>51</sup> See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976)* (statement of Bruno A. Ristau, chief of the Foreign Litigation Section, Civil Division, Dept. of Justice) (emphasis added). Specifically, Mr. Ristau states:

It should also be stressed that the long-arm feature of the bill will insure that "only those disputes which have a relation to the United States are litigated in the courts of the United States and that our courts are not turned into small international courts of claim". The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

*Id.*

<sup>52</sup> Show Cause Order, *supra* note 11, at 2.

<sup>53</sup> 326 U.S. 310 (1945).

with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>54</sup>

The minimum contacts requirement enunciated by the Supreme Court in *International Shoe* was reiterated and confirmed in the Supreme Court case of *Shaffer v. Heitner*.<sup>55</sup> In that case the Court concluded that the *International Shoe* standards apply to all assertions of jurisdiction in a state court.<sup>56</sup> Thus, the Court denied jurisdiction in a *quasi in rem* action when the property serving as the basis for state court jurisdiction was completely unrelated to the plaintiff's cause of action.<sup>57</sup>

Although *Shaffer* can be distinguished from the present controversy in that this case involves a proposed waiver, rather than the presence of property, as the basis for jurisdiction, the district court in the recent case of *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*,<sup>58</sup> citing *Shaffer* and other *International Shoe* descendants,<sup>59</sup> refused to exercise personal jurisdiction over the Iranian defendants despite the waiver of sovereign immunity clause in the United States-Iran Treaty of Amity.<sup>60</sup> The court stated:

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<sup>54</sup> *Id.* at 316 (citations omitted).

<sup>55</sup> 433 U.S. 186, 210-11 (1977).

<sup>56</sup> *Id.* at 212. The court stated, "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* (footnote omitted).

<sup>57</sup> *Id.* at 209. The Court stated:

Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. *If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.*

*Id.* (emphasis added).

<sup>58</sup> 506 F. Supp. 981 (N.D. Ill. 1980).

<sup>59</sup> The *International Shoe* descendants include: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); and *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

<sup>60</sup> *Chicago Bridge*, 506 F.Supp. at 984-87. See Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, United States-Iran, art. XI, § 4, 8 U.S.T. 899, 909, T.I.A.S. No. 3853.



[T]here is a more fundamental objection to the exercise of personal jurisdiction on the basis of a waiver of sovereign immunity. In light of *Shaffer v. Heitner*, *World-Wide Volkswagen Corp. v. Woodson*, and other *International Shoe* descendants, we believe the fiction of implied consent cannot obviate the need for establishing minimum contacts with a forum . . . .

. . . . We are not the first court to question the use of waiver as a substitute for due process fairness in the exercise of jurisdiction over foreign sovereigns. . . .

It is to be noted that the "primary" purpose of the Foreign Sovereign Immunities Act of 1976 was to strip foreign states of their immunity from suit when they engaged in private commercial conduct, thereby placing them on the same footing as non-governmental entities . . . . Eliminating the need to establish personal jurisdiction over those governmental enterprises, however, through the fiction of consent puts them in a far worse position.<sup>61</sup>

Finally, in *Verlinden B. V. v. Central Bank of Nigeria*<sup>62</sup> the Supreme Court mentioned, but did not decide, the issue of whether "by waiving its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States."<sup>63</sup> The Court noted that the FSIA apparently does not affect the *forum non conveniens* doctrine.<sup>64</sup> Presumably, the court was implying that the requirement of minimum contacts with the forum state must be met.

These constitutional guidelines have been recognized by Congress, and, in its enactment of the FSIA, consistency with such constitutional guidelines was clearly intended.<sup>65</sup> It is thus incumbent upon the DOT, in exercising its powers and authority to regulate foreign air transportation, to comply with such constitutional guidelines consistent with congressional policy.

<sup>61</sup> *Chicago Bridge*, 506 F.Supp. at 985-87 (emphasis added, citations omitted).

<sup>62</sup> 461 U.S. 480 (1983).

<sup>63</sup> *Id.* at 490, n.15.

<sup>64</sup> *Id.*

<sup>65</sup> House Report, *supra* note 37, at 13, reprinted in 1976 U.S. CODE. CONG. & ADMIN. NEWS, at 6612.

## CONCLUSION

It would be imprudent for the DOT to adopt the proposed action of revising and expanding the waiver of sovereign immunity presently contained in the operating authorities of all foreign air carriers. Although the DOT may mean well, nevertheless, the DOT has no statutory authority to adopt its proposed action. The answer to the DOT's concern clearly is congressional action on the matter. The more prudent move for the DOT, therefore, would be to propose a revision of the FSIA and/or the adoption of the Guatemala or Montreal Protocols.<sup>66</sup>

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<sup>66</sup> It is an interesting question whether United States ratification of the Guatemala Protocol with its article XII expansion of Warsaw's article 28 jurisdiction would *ipso facto* give United States courts jurisdiction over all cases that are not now subject to United States jurisdiction but that would be covered by the DOT's proposed expansion. Ratification of the Guatemala Protocol, however, most likely would permit suit in the United States in circumstances, as here, involving two United States Government employees while on official business abroad—even though they purchased their tickets abroad, the tickets involved only two foreign points, and the injury occurred aboard a foreign carrier.

