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Kevin F. Cook

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COUNTING THE DRAGON'S TEETH: FOREIGN SOVEREIGN IMMUNITY AND ITS IMPACT ON INTERNATIONAL AVIATION LITIGATION

KEVIN F. COOK*

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* A.B., Fairfield University; M.A., The National University of Ireland (University College Dublin); J.D., Suffolk University Law School. Mr. Cook is with the firm of Mendes & Mount, New York. The author gratefully acknowledges the gracious and thoughtful assistance of Professor Henry P. de Vries, Professor of Law, Columbia University Law School and Partner, Baker & McKenzie, New York.

I. INTRODUCTION

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him or to tame him and make him a useful animal.¹

THE OBJECT of this paper is to expose the features of foreign sovereign immunity and the case law that has emerged in response to this defense. When Congress enacted the Foreign Sovereign Immunities Act of 1976 ("Immunities Act")² it introduced into our law, for the first time, comprehensive provisions to inform parties when they have recourse to the courts to assert a legal claim against a foreign state.³ This paper discusses (1) the origins of foreign sovereign immunity in the United States courts, (2) the Immunities Act and recent case law construing its provisions, and (3) the role of foreign sovereign immunity in modern aviation tort litigation. Before addressing the intricacies of foreign sovereign immunity however, it will be useful to examine some basic problems of jurisdiction.

Jurisdiction connotes the power of a court to affect a person's legal relations and in personam jurisdiction denotes a court's power to award a final judgment that imposes personal liability against a defendant. A state may affect a person's legal interests only insofar as that state has power over him:

The fundamental requirement as to the jurisdiction of a State over a person is that there should be such a relation between the State and the person that it is reasonable for the State to exercise control over him through its courts.⁴

The power a court holds over the parties to a lawsuit may, in some circumstances, derive from the presence of a defendant within the territory of the forum.⁵ Ordinarily, when the defendant

¹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

² 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), and 1602-1611 (1976). For a discussion of the English treatment of foreign sovereign immunity, see Bird, *The State Immunity Act of 1978: An English Update*, 13 INT'L LAW. 619 (1979).

³ See *Jet Line Services, Inc. v. M/V Marsa El Harriga*, 462 F. Supp. 1165, 1168-71 (D. Md. 1978).

⁴ RESTATEMENT OF JUDGMENTS § 14, comment a (1942).

⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

is a domestic corporation, being a creature of the state of its incorporation, it is subject to the in personam jurisdiction of the courts of that state. This general rule will prevail even though this corporation may not do business in the forum.⁶

When the defendant is a foreign corporation the issue becomes complicated. When the foreign corporation has obtained authority from the forum to do business there, it may be treated as though it is a domestic corporation and in personam jurisdiction may be acquired. When the foreign corporation does not take the trouble to obtain an authorization, however, another basis of in personam jurisdiction is required. It is in this realm that the genius of the common law in creating legal fictions excelled. Looking for a predicate for corporate jurisdiction similar to the physical presence of an individual in a state, American courts seized the concept of "doing business" in a forum.⁷ Since a corporation could not be physically present within a forum, the nearest cousin was adopted; a foreign corporation was "deemed" to be physically present when its activities in the forum were substantial enough to support a finding that it was doing business within that forum. Moreover, in response to modern constitutional rulings expanding the right of the states to exercise in personam jurisdiction over a host of foreign corporations that would have escaped jurisdiction under the doing business predicate, the legislatures of the states promulgated jurisdictional status that created the basis of "long arm" jurisdiction over foreign corporations.⁸ In an appropriate case, a foreign corporation may perform a single act that, because of its nature, quality, and the circumstances of its commission, is sufficient to subject the corporation to in personam jurisdiction.⁹ An attribute that is common to all of these "long-arm" statutes is that the claim must arise out of an act performed in the forum.¹⁰

When the defendant is an entity owned by a foreign state the issue becomes more complex. The Immunities Act con-

⁶ RESTATEMENT OF JUDGMENTS § 27 (1942).

⁷ *E.g.*, *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

⁸ *E.g.*, N.Y. CIV. PRAC. LAW § 302 (McKinney 1972).

⁹ *Compare* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁰ *E.g.*, *Peters v. Robin Airlines*, 281 A.D. 903, 120 N.Y.S.2d 1 (2d Dept. 1953). In this connection, note particularly the provisions of New York Civil Practice Law and Rules § 302(b) (McKinney 1972).

tains a special rule of in personam jurisdiction. Its peculiarity lies in the fact that it omits any provision for the jurisdictional predicate of "doing business."¹¹ In other words, Congress, through the Immunities Act, has not exercised its full constitutional power and has granted American courts in personam jurisdiction over foreign state enterprises, assuming proper service, only when the claim, as distinguished from the entity, has a connection with the territory of the United States. As a consequence, no lawyer contemplating a suit against a foreign state entity in an American court should assume that a court has in personam jurisdiction merely because that entity does business within the forum.

II. THE HISTORICAL BACKDROP

The freedom of a foreign state from being haled into court has impressive title-deeds and has become part of the very fabric of our law. It assumed this position solely through the adjudications of the Supreme Court of the United States. Unlike the special position accorded the Sister States by the Eleventh Amendment, the privileged position of a foreign state was not an explicit command of our Constitution. Instead it rested on the common law created by the Supreme Court. The rise of foreign sovereign immunity can be contrasted with the decline of the immunity enjoyed by the United States as a territorial sovereign. The latter form of sovereign immunity was found to be increasingly in conflict with the growing subjection of American governmental action to moral judgment. As early as 1797, this chilly feeling against sovereign immunity began to reflect itself in federal legislation.¹² At that time Congress decided that when the United States sues an individual, the individual can set-off all debts properly due from the sovereign to him. In addition, because of the objections to *ad hoc* legislative allowances of private claims, Congress, some fifty years later, created the Court of Claims where the United States, like any other obligor, may be held affirmatively to its undertakings.¹³

¹¹Harris v. VAO Intourist, 481 F. Supp. 1056, 1060 (E.D.N.Y. 1979). See note 37 *infra*.

¹² Act of March 3, 1797, §§ 3-4, 1 Stat. 514-15. The present version appears in 28 U.S.C. § 2406 (1976).

¹³ Act of Feb. 24, 1855, 10 Stat. 612, amended by 12 Stat. 765, 14 Stat. 9.; see 28 U.S.C. §§ 1491-1507 (1976).

On the other hand, the doctrine of immunity for foreign states gradually developed at the bar of the Supreme Court. Early in our judicial history Mr. Justice Marshall, in *The Schooner Exchange v. M'Faddon*,¹⁴ recognized a foreign state's claim of immunity where a vessel was in the foreign state's possession and service. In that case the Court introduced in the federal courts the practice of surrendering jurisdiction when the Executive certified to the Judiciary its endorsement of immunity.¹⁵ Marshall articulated the view that no sovereign could be made amenable to another and that "the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."¹⁶ Under this view, a foreign state was absolutely immune from suit without its consent. As international commerce began to grow, the "restrictive" theory of immunity began to emerge. This approach expanded immunity to public acts and contracted it with respect to private acts. In other words, a foreign state shed its mantle of sovereignty when it entered the marketplace.¹⁷

As the agency responsible for the conduct of foreign affairs, the Department of State was the normal organ that suggested to the courts that a foreign state be granted immunity from a particular suit.¹⁸ Its failure or refusal to suggest immunity was accorded significant weight by the Supreme Court.¹⁹ This deference was based on the consideration of the potentially embarrassing consequences on diplomatic relations that could accompany judicial rejection of a claim of foreign sovereign immunity. In 1952, through the famous Tate Letter,²⁰ the Department of State made it clear that its policy would be to decline to recommend immunity to foreign sovereigns in suits arising out of private or commercial activity. Yet the department offered no criteria for differentiating

¹⁴ 7 Cranch 116 (1812).

¹⁵ *Id.* at 147.

¹⁶ *Id.* at 137.

¹⁷ See *United Mexican States v. Ashley*, 556 S.W.2d 784, 785-86 (Tex. 1977); see also H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 5 U.S. CODE CONG. & AD. NEWS 6604, 6605 (1976) [hereinafter referred to as HOUSE REPORT].

¹⁸ See *Ex Parte Republic of Peru*, 318 U.S. 578, 581 (1943).

¹⁹ See, e.g., *Compania Espanola v. Navemar*, 303 U.S. 68 (1938).

²⁰ 26 Dept. State Bull. 984 (1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976).

between private and public acts.²¹ To further complicate matters, the Department of State, being subject to political pressure, was not consistent in its own approach. Under the circumstances, it is not surprising that neither the courts nor commentators were able to suggest any satisfactory test.²² Some looked to the nature of the transaction and categorized as sovereign only those activities that could not be performed by individuals.²³ While this criterion was relatively easy to apply, it often produced astonishing results. For example, some European courts held that the purchase of bullets or shoes for the army, the erection of fortifications for defense, or the rental of a house for an embassy were private acts.²⁴ Other courts looked to the purpose of the transaction, categorizing as public all activities in which the object of performance was public in nature.²⁵ This test was even more unsatisfactory because, conceptually, the modern state always acts for a public purpose.²⁶ Functionally, the criterion was purely arbitrary and necessarily involved the courts in projecting subjective notions about the proper realm of state action.²⁷

In due course this conceptual dichotomy became unworkable and capricious. In *Petrol Shipping Corp. v. The Kingdom of Greece, Ministry of Commerce, Purchase Directorate*²⁸ the United States Court of Appeals for the Second Circuit held that a contract for the shipment of grain was a private act, while in *Isbrandtsen Tankers, Inc. v. President of India*²⁹ the same court, five years later, held that a similar contract was a public act. In *Kingdom of Romania f. Guaranty Trust Co.*³⁰ the plaintiff contracted for

²¹ See, e.g., *Victoria Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

²² 336 F.2d at 359-60.

²³ *Id.*

²⁴ E. ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS* 31 (1933).

²⁵ Fensterwald, *Sovereign Immunity and Soviety State Trading*, 63 HARV. L. REV. 614, 621 (1950).

²⁶ Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y. B. INT'L L. 220, 224 (1951).

²⁷ Friedmann, *The Growth of State Control Over the Individual, and its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y. B. INT'L L. 118, 128 (1938).

²⁸ 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966).

²⁹ 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971).

³⁰ 250 F. 341 (2d Cir.), cert. denied, 246 U.S. 663 (1918).

the purchase of goods for use by the Romanian army. The Second Circuit held that a counter-claim arising out of the same transaction could be asserted by the defendant, while in *Et Ve Balik Kurumu v. B.N.S. International Sales Corp.*,³¹ over forty years later, the Supreme Court of the State of New York, in a case involving the purchase of food for consumption by the Turkish army, reached the opposite conclusion.

In those instances where a foreign state failed to obtain the coveted suggestion of immunity, the courts were known to retain jurisdiction without further inquiry.³² As could be expected, this deference by the Judiciary to the Executive generated considerable dissatisfaction.³³ The conceptual difficulties involved in formulating a satisfactory method of differentiating between public and private acts led many commentators to declare that the distinction was useless.³⁴ The Supreme Court held, however, that when the Department of State was silent on the question of immunity in a case, it became the court's duty to determine for itself whether a foreign state was entitled to immunity "in conformity to the principles accepted by the department of the government charged with the conduct of foreign relations."³⁵ Since the Department of State publicly pronounced its adherence to the distinctions, it had to be applied.

In order to create some order out of chaos and to relieve the Department of State from a judicial function and the accompanying political pressure, Congress created the Immunities Act.³⁶ The Immunities Act frames the issues to be solved in deciding the question of immunity and formulates standards that are to be applied to those issues. These issues should be resolved in the following order: whether the defendant is a foreign state and therefore

³¹ 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *affd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (App. Div. 1962).

³² *Petrol Shipping Corp. v. The Kingdom of Greece, Ministry of Commerce, Purchase Directorate*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

³³ Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946).

³⁴ Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 14 BRIT. Y. B. INT'L L. 101, 123-24 (1933).

³⁵ *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

³⁶ See *Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. (1976) [hereinafter cited as *Hearings*].

has standing to invoke the Immunities Act; whether any exceptions apply; and, if not, whether immunity has been waived.

III. THE IMMUNITIES ACT

A. *An Overview*

The general rule of the Immunities Act, subject to certain exceptions, is that a "foreign state" is immune from the jurisdiction of the courts of the United States and of the several States.³⁷ The courts alone are responsible for determining whether a foreign state is entitled to immunity under the Immunities Act.³⁸ The Department of State no longer has a role to play in this determination.

When a court is faced with a claim of foreign sovereign immunity, the first issue that it must resolve is whether the defendant falls within the definition of a "foreign state." That term includes a political subdivision of the foreign state or an agency or instrumentality of the state.³⁹ An "agency or instrumentality of a foreign state" means any entity that is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other

³⁷ 28 U.S.C. § 1604 (1976). Venue provisions appear at 28 U.S.C. § 1391(f) (1976). The Immunities Act "makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction [§§ 1330(a) and 1605-1607] plus service of process [§ 1608] equals personal jurisdiction [§ 1330(b)]." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, No. 80-7703, slip op. at 2592 (2d Cir. April 16, 1981).

"A section 1605(a)(2) case" calls for the resolution of five questions. As stated in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, No. 80-7703, slip op. at 2592-93 (2d Cir. April 16, 1981), they are:

- 1) Does the conduct the action is based upon or related to qualify as "commercial activity"?
- 2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)?
- 3) Does the exercise of this congressional subject matter jurisdiction exists within the permissible limits of the "judicial power" set forth in Article III?
- 4) Does subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?
- 5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

³⁸ 28 U.S.C. § 1602 (1976).

³⁹ 28 U.S.C. § 1603(a) (1976).

ownership interest is owned by a foreign state or political subdivision thereof, and which is neither a citizen of a State of the United States nor created under the laws of any third country.⁴⁰ A foreign state has an absolute right to have the suit removed from a state court to a federal district court.⁴¹

Once the "foreign state" status is determined, immunity is automatic unless one of the exceptions applies. The most important exception, other than waiver, is the "commercial activities" exception embodied in section 1605(a)(2) of the Immunities Act. Under this section foreign sovereign immunity is unavailable in an action based upon a commercial activity carried on *in* the United States by a foreign state (hereinafter referred to as clause one), or upon an act performed in the United States *in connection with* the commercial activity of a foreign state elsewhere (hereinafter referred to as clause two), or upon an act performed outside the territory of the United States in connection with a commercial activity of a foreign state elsewhere and that act causes a *direct* effect in the United States (hereinafter referred to as clause three).⁴²

Other exceptions include section 1605(a)(3) which denies immunity in two categories of cases where rights in property taken in violation of international law are in issue. The first category involves cases where the property is present in the United States in connection with commercial activity carried on in the United States by the foreign state.⁴³ The second category is where the property, or any property exchanged for such property, is owned or operated by a foreign state and it is engaged in commercial activity in the United States.⁴⁴ The term "taken in violation of international law" includes the expropriation of property without payment of compensation as required by international law. Since this section deals solely with the issue of immunity, it does not affect existing law concerning the extent to which the "act of state" doctrine may be applicable.⁴⁵

⁴⁰ 28 U.S.C. § 1603(b) (1976).

⁴¹ 28 U.S.C. § 1441(d) (1976).

⁴² 28 U.S.C. § 1605(a)(2) (1976).

⁴³ 28 U.S.C. § 1605(a)(3) (1976).

⁴⁴ *Id.*

⁴⁵ HOUSE REPORT, *supra* note 17, at 20. Cf. Alfred Dunhill of London, Inc.

Section 1605(a)(5) governs non-commercial torts and provides that immunity is not available to a foreign state in cases in which money damages are sought against a foreign state for personal injury or death, or damages to or loss of property, that occurs in the United States and is caused by the tortious act or omission of a foreign state or any official or employee of a foreign state while acting within the scope of his employment.⁴⁶ This provision allows immunity if the action is based upon acts of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.⁴⁷ Moreover, a foreign state retains immunity by virtue of this provision if the claim is based upon an official's performance of a discretionary function, regardless of whether that discretion was abused.⁴⁸

Paragraph 5 is applicable only to the issue of a "foreign state's" obligation to answer suit. It is not addressed to the issue of the personal liability of an individual claiming diplomatic immunity. In this connection Congress has adopted the rules of the Vienna Convention on Diplomatic Relations as our law on diplomatic immunities.⁴⁹

A foreign state is not immune from the jurisdiction of American courts if it has waived its immunity.⁵⁰ Among the ways immunity can be waived is by treaty or by private contract. In such cases the waiver may not be withdrawn except in accordance with the terms set forth in the original waiver.⁵¹

Section 1605(b) of the Immunities Act denies immunity in cases where a suit in admiralty is brought to enforce a lien against a vessel or cargo of a foreign state, the maritime lien is based upon a commercial activity of the foreign state and the conditions

v. Republic of Cuba, 425 U.S. 682 (1976) (discussion of the "act of state" doctrine). *Dunhill* was only a plurality opinion and it is not entirely clear that commercial activities are always not subject to an act of state defense. Footnote 1 of the House Report at 20 suggests that Congress presumed that any case falling within section 1605(a)(3) would not be subject to an act of state defense. Thus at least to the extent that a claim falls within section 1605(a)(3) one may argue that the act of state doctrine should not apply.

⁴⁶ 28 U.S.C. § 1605(a)(5) (1976).

⁴⁷ 28 U.S.C. § 1605(a)(5)(B) (1976).

⁴⁸ 28 U.S.C. § 1605(c)(5)(A) (1976).

⁴⁹ 22 U.S.C. § 254(a)-(e) (Supp. III 1979).

⁵⁰ 28 U.S.C. §§ 1604, 1605(a)(1) (1976).

⁵¹ 28 U.S.C. § 1605(a)(1) (1976).

in paragraphs (1) and (2) of this section have been met.⁵² Section 1605(b) does not preclude either a suit in accordance with other provisions of the Immunities Act, such as section 1605(a)(2) or a second action, otherwise permissible, to recover the amount by which the value of the lien exceeds the recovery in the first action.⁵³

B. *The Statute's Standing Requirements*

The federal courts have non-exclusive jurisdiction over "any nonjury civil action against a foreign state" with respect to any claim for which the foreign state is not entitled to immunity.⁵⁴ The Immunities Act establishes a procedure whereby a plaintiff may bring a foreign state before an American court, either state or federal, obtain a ruling on its immunity, and secure an adjudication of his claim.

To interpret the Immunities Act a court must first focus on whether the defendant may be classified as a "foreign state" and thus be entitled to invoke, in any set of circumstances, the protection offered by the Immunities Act. In most cases the issue of a foreign state, *qua* country, is not controversial.⁵⁵ In some cir-

⁵² 28 U.S.C. § 1605(b) (1976).

⁵³ *Id.*

⁵⁴ 28 U.S.C. § 1330(a) (1976). See note 37 *supra*. Exactly what the ramifications are of Congress' wording with respect to the right to trial by jury is a matter of considerable dispute. Compare *Ruggiero v. Compania Panama de Vapores*, 639 F.2d 872 (2d Cir. 1981); *Herman v. El Al Israel Airlines, Ltd.*, 15 Av. L. REP. (CCH) § 18,507 (S.D.N.Y. 1980); *Jones v. Shipping Corp. of India, Ltd.*, 491 F. Supp. 1260 (E.D. Va. 1980); and *Williams v. Shipping Corp. of India*, 489 F. Supp. 526 (E.D. Va. 1980) (jury demand stricken) with *Houston v. Murmansk Shipping Co.*, 87 F.R.D. 71 (D. Md. 1980); *Rex v. Cia. Pervana de Vapores, S.A.*, 493 F. Supp. 459 (E.D. Pa. 1980); *Icenogle v. Olympic Airways, S.A.*, 82 F.R.D. 36 (D.D.C. 1979); and *Lonon v. Companhia de Navegacao Lloyd Brasileiro*, 85 F.R.D. 71 (E.D. Pa. 1979) (jury demand upheld). In view of the fact that the Immunities Act does not give the federal courts exclusive subject matter jurisdiction over cases involving foreign states, a claim against such a defendant may also be asserted in state court. The Immunities Act does not specifically address the question, in the latter situation, of the right to a jury trial.

(The author wishes to thank Olympic's attorneys for making available to him the affidavits and memoranda that were submitted to the court in connection with the motion to strike the jury demand.).

⁵⁵ Compare *Windert Watch Co., Inc. v. Remex Electronics Limited*, 468 F. Supp. 1242 (S.D.N.Y. 1979) (Hong Kong is a Crown Colony and not a political subdivision of the United Kingdom) with *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) (the mission is itself a foreign state, not a mere instrumentality of a foreign state).

cumstances, however, the identity of a defendant has been put in issue. In *Edlow International Co. v. Nuklearna Krsko*⁵⁶ the question was whether the defendant, a workers' organization, was an organ or political subdivision of Yugoslavia. Since diversity of citizenship jurisdiction was absent, the plaintiff attempted to maintain "federal question" jurisdiction under the Immunities Act. Accordingly, the plaintiff contended, in a reverse twist, that the defendant was an agency or instrumentality of Yugoslavia. In observing that the defendant's activity was virtually free from governmental control, the United States District Court for the District of Columbia held that state ownership, without more, was not determinative of this defendant's status under the Immunities Act.⁵⁷ As a result, the court dismissed the action for lack of federal question subject matter jurisdiction. On the other hand, in *Outboard Marine Corp. v. PEZETEL*⁵⁸ the plaintiff alleged that the defendant, a Polish government-owned corporation, was engaged primarily in commercial activities common to private companies that were not state-owned or controlled. The defendant contended that it, like the Republic of Poland, was entitled to sovereign status.⁵⁹ In rejecting this argument the United States District Court for the District of Delaware stated:

It does not follow that because a business in such a country has objectives and governmental ties alien to those of enterprises in a capitalist system that each such business is equal in stature to the government under which it operates.⁶⁰

Since *PEZETEL* was not considered to be equivalent to the Republic of Poland, it, unlike the sovereign, was not immune, under section 1606, from punitive treble damages for anti-competitive practices.⁶¹

⁵⁶ 441 F. Supp. 827 (D.D.C. 1977). In the absence of a claim arising under federal law, a party may not claim federal question subject matter jurisdiction by anticipating the defense of foreign sovereign immunity under the Immunities Act. *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413 (2d Cir. April 16, 1981).

⁵⁷ *Edlow Int'l Co. v. Nuklearna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1977).

⁵⁸ 461 F. Supp. 384 (D. Del. 1978).

⁵⁹ *Id.* at 394-95.

⁶⁰ *Id.* at 396.

⁶¹ *Id.* at 397.

C. Three Exceptions to the General Rule of Immunity

One of the Immunity Act's central features is its specification in section 1605(a)(2) of categories of actions involving commercial activity for which foreign states are not entitled to claim immunity. These exceptions involve substantive acts for which a foreign state may be held accountable in the United States. This feature of the Immunities Act effects a combination of substance and procedure whereby a court, faced with an assertion of immunity, must engage in a close comparison of the underlying claim for relief with section 1605(a)(2) in order to decide, assuming proper service, whether a foreign state is subject to in personam jurisdiction under the Immunities Act.

The term "commercial activity" appears in all three clauses of section 1605(a)(2). In light of this language, the courts have often avoided the task of separately construing these clauses. Instead, courts have usually found it expedient to rule on the common issue of whether the defendant's activities have been "commercial."⁶² Under the Immunities Act the character of an activity is determined by reference to the nature of the act rather than to its purpose.⁶³ In *Yessenin-Volpin v. Novosti Press Agency*⁶⁴ the plaintiff attempted to show that the defendants had engaged

⁶² Although the Immunities Act does not define "commercial," it does define "commercial activity" in 28 U.S.C. § 1603(d) (1976) and "commercial activity carried on in the United States by a foreign state" in 28 U.S.C. § 1603(e) (1976). In a case having long range implications, *International Ass'n of Machinists and Aerospace Workers v. Organization of the Petroleum Exploring Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), a labor union sued OPEC and its thirteen member nations alleging illegal price fixing, a *per se* violation of the Sherman Act. Initially, the court held that OPEC could not be served with process under any federal statute. *Id.* at 560. The court considered section 1603(d)'s definition of commercial activity and stated that it should be construed narrowly. *Id.* at 567. In holding that the union's claims did not arise out of commercial activity and that there was no statutory basis to support in personam jurisdiction, the court stated:

In view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity.

Id. at 568. In addition, the court stated that a foreign sovereign could not be subject to Sherman Act liability in any event. *Id.* at 570. It should be noted, however, that a foreign state may bring suit under the Sherman Act. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 322 (1978).

⁶³ 28 U.S.C. § 1603(d) (1976).

⁶⁴ 443 F. Supp. 849 (S.D.N.Y. 1978).

in commercial activity within the meaning of section 1605(a)(2). The United States District Court for the Southern District of New York initially eliminated both the first and second clauses of section 1605(a)(2) because the alleged libel—the purported commercial activity—was published outside the United States.⁶⁵ In an attempt to invoke clause three, the plaintiff enumerated Novosti's commercial activities.⁶⁶ In rejecting this approach, the court admonished that the focus must be the specific activity giving rise to the claim and not a general characterization of the entity.⁶⁷ The court found that Novosti's activities were not commercial, but were acts of intra-governmental cooperation and were to be regarded as official commentary of the Soviet government.⁶⁸ In *Carey v. National Oil Corp.*⁶⁹ the plaintiffs sought damages because of alleged breaches of contract by the defendant, a company owned by the Libyan government. As in *Novosti Press*, the Second Circuit analyzed the claims for relief in light of clause three. Since the parties to the instruments resided wholly outside the United States, the court was unable to find any "direct" effect flowing into the United States as a consequence of these alleged breaches.⁷⁰ After having found an adequate ground to dismiss the claims, the court appeared to imply that the defendants would also be entitled to immunity because they scrupulously avoided meaningful entry into the United States.⁷¹ This approach, however, shifts the focus away from the claim's connection with the United States and toward the defendant's activity in the United States. In *Upton v. Empire of Iran*,⁷² travelers were awaiting a flight in an airport

⁶⁵ *Id.* at 855.

⁶⁶ *Id.*

⁶⁷ *Id.* at 856.

⁶⁸ *Id.*

⁶⁹ 592 F.2d 673 (2d Cir. 1979), *aff'd*, 453 F. Supp. 1097 (S.D.N.Y. 1978).

⁷⁰ *Id.* at 676.

⁷¹ *Id.* The focus of inquiry should not be whether the defendant has done business in the United States, but whether the plaintiff's claim falls within one of the three excepting clauses of § 1605(a)(2). *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, No. 80-7703, slip op. at 2598-602 (2d Cir. April 16, 1981); *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, No. 80-7851, slip op. at 2616 (2d Cir. April 16, 1981) (immunity defense stricken).

⁷² 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). It is unclear whether the Warsaw Convention, *infra* note 113, was applicable. See note 121 *infra*.

terminal in Tehran, Iran when the roof collapsed on them. The plaintiffs alleged negligence and strict liability in tort against both Iran and its Department of Civil Aviation. Apparently recognizing the inapplicability of clauses one and two, the plaintiffs contended that clause three of section 1605(a)(2) vitiated the immunity defense. The ultimate question under clause three was whether the accident caused a "direct" effect in the United States. The United States District Court for the District of Columbia recognized that the Immunities Act was formulated on long-arm jurisdictional concepts. By way of comparison, under the District of Columbia long-arm statute also passed by Congress the suffering of a loss within the District, as a result of acts outside the forum, does not establish a satisfactory nexus with the forum to support in personam jurisdiction.⁷³ Following this approach, the court refused to rely on the attenuated connection between an extraterritorial act and a domestic effect in order to sustain in personam jurisdiction.

Two important conclusions can be drawn from these cases. First, the first and second clauses of section 1605(a)(2) were interpreted to be inapplicable to claims that arose outside the territory of the United States. Second, clause three of section 1605(a)(2), containing the "direct effect" language, was construed rather narrowly:

The common sense interpretation of a "direct effect" is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.⁷⁴

IV. HARRIS V. VAO INTOURIST

Harris v. VAO Intourist,⁷⁵ the next decision in this line of cases, is important largely because of its comprehensive and penetrating analysis of all three clauses of section 1605(a)(2). If there was any doubt prior to *Harris* that jurisdiction over a foreign state corporation could be based merely on that corporation "doing business" in the United States, *Harris* put that question to rest.

⁷³ *Id.* at 266. While not recognized by the court, Iran probably expressly waived its sovereign immunity through the Treaty of Amity with the United States, *infra* notes 99 & 105.

⁷⁴ *Id.* at 266.

⁷⁵ 481 F. Supp. 1056 (E.D.N.Y. 1979).

Harris also clarified clause one of section 1605(a)(2) which requires that an action be "based upon" commercial activity carried on in the United States.

In October, 1976, Harris' decedent, Raymond De Jongh, a United States citizen, obtained permission in New York from Intourist, the Russian National Tourist Agency, to travel to Moscow. Intourist selected the National Hotel in Moscow as De Jongh's accommodations. During the early morning of October 27, 1976, a fire erupted in the hotel and caused fatal third degree burns over ninety-five percent of De Jongh's body. In 1978 Harris filed an action in the United States District Court for the Eastern District of New York against VAO Intourist—Moscow; Intourist—New York; the National Hotel, and the Union of Soviet Socialistic Republics. The complaint alleged that one or more of the defendants had negligently owned, leased, operated, managed, and controlled the hotel.⁷⁶

All defendants moved to dismiss the complaint on alternative grounds that each of them was, under the Immunities Act, immune from the in personam jurisdiction of the court; or that the court should invoke its discretion and refrain from exercising its already acquired jurisdiction under the doctrine of *forum non conveniens*;⁷⁷ or that the plaintiff failed to serve process properly on the defendants.⁷⁸ Without reaching the last two contentions, the court held that all defendants were entitled to foreign sovereign immunity. The plaintiff did not appeal from the order dismissing the complaint.

⁷⁶ *Id.* at 1057.

⁷⁷ The doctrine of *forum non conveniens* in the aviation field received thorough treatment in *People ex rel Compagnie Nationale Air France v. Gilbreto*, 74 Ill. 2d 90, 383 N.E.2d 977 (1978), *cert. denied*, 441 U.S. 932 (1979), a case arising out of the 1976 Entebbe hijacking. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980), *cert. granted*, 101 S. Ct. 1346 (1981); *Fosen v. United Technologies Corp.*, 484 F. Supp. 490 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir. 1980); *Orion Ins. Co. Ltd. v. United Technologies Corp.*, 15 Av. L. REP. (CCH) § 18,061 (S.D.N.Y. 1980); *Macedo v. Boeing Co.*, 15 Av. L. REP. (CCH) § 18,032 (N.D. Ill. 1980), *appeal docketed*, No. 80-1559 (7th Cir. April 21, 1980); *Hemmelgarn v. Boeing Co.*, 15 Av. L. REP. (CCH) § 18,328 (Cal. App. 1980).

⁷⁸ The first and third grounds are inter-connected. See note 37 *supra*. 28 U.S.C. § 1608 (1976) provides the usual, but not the exclusive, method of service on a foreign state. *E.g.*, *New England Merchants Nat. Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980).

The court recognized that Congress, through the Immunities Act, "authorized the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process."⁷⁹ The court was required to decide whether all of the three exceptions found in section 1605(a)(2) encompassed Harris' claim. Initially, the court observed:

[B]ecause of the absence of a "doing business" provision . . . in the Immunities Act, the essential factual issue is not the degree of oblique contacts of the National Hotel with the United States. . . . Systematic and continuous contacts with the United States do not provide the grounds for finding an exception to the Immunities Act and a basis of jurisdiction.⁸⁰

Clause two of section 1605(a)(2) was quickly disposed of since it relates only to an action based upon an act performed in the United States: "Because the allegedly negligent act—unsafe operation of the hotel—took place in The Union of Soviet Socialistic Republics, the second clause does not apply."⁸¹

The court further determined that clause three of section 1605(a)(2) was inapplicable. This clause relates only to an act which has a "direct effect" in the United States. Judge Weinstein observed:

[T]he precise issue is not whether the fire had any effect here, but whether it had a "direct effect" in the United States within the meaning of the statutory language. Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the "direct effect" requirement of section 1605(a)(2).⁸²

The first clause of section 1605(a)(2), dealing with actions based upon commercial activity in the United States, although more difficult to interpret, was also rejected as a means of piercing the defendants' immunity defense. The court compared the language of the Immunities Act with various long-arm statutes:

⁷⁹ *Harris v. VAO Intourist*, 481 F. Supp. 1056, 1059 (E.D.N.Y. 1979).

⁸⁰ *Id.* at 1060.

⁸¹ *Id.* at 1061.

⁸² *Id.* at 1062 *Cf.*, *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 527 (D.D.C. 1980) (failure to make compensation to American insurance companies at time of taking of property was a "direct" effect in the United States).

The first clause of section 1605(a)(2) focuses upon actions arising from commercial activity within the United States. This is essentially a clause which deals with the transaction of individual business deals in the United States. It is not equivalent to the "doing business" provisions. . . . The clause requires that the court action "be based upon" the specific commercial activity carried on in the United States. It resembles the "transaction" of business clauses used in many of the long-arm provisions [citation omitted]. The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that this clause is not applicable.⁸³

By omitting a "doing business" provision, Congress, through the Immunities Act, withdrew from the Judiciary a jurisdictional basis upon which it has traditionally rested its power over foreign corporations. In its place Congress installed a jurisdictional statute that requires a court to ignore the "doing business" basis and to determine jurisdiction solely in terms of far more exacting "long-arm" considerations. It is surprising that such a radical change in the traditional approach to jurisdiction is not even mentioned in the Immunities Act's legislative history. Even more anomalous is that under section 1605(a)(3) a plaintiff may sue a foreign state for the taking of property without compensation as long as that foreign state is engaged in commercial activity within the territory of the United States, even though its activity in the United States is not connected with the taking. Thus if Congress intended to abolish entirely the "doing business" jurisdictional basis, it apparently left a loophole.

The plaintiff in *Harris* did argue that the defendants had, through various instruments, waived their right to plead the personal defense of immunity. These instruments were of no aid to the plaintiff, however, because they did not address directly the waiver question. In the aviation field, to which we now turn, a federal statute, certain bilateral treaties, and a multilateral treaty tend to alleviate the harshness of the Immunities Act.

⁸³ 481 F. Supp. at 1061. See *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 988 (N.D. Ill. 1980).

V. FOREIGN SOVEREIGN IMMUNITY IN THE AVIATION TORT FIELD

Although the justification for immunity in the tort field may be dubious because it thwarts reasonable expectations, it is a hurdle that will have to be negotiated. In its present form it leaves very little maneuvering room for a judge who otherwise would be inclined to strike such a defense. This reality was recognized expressly by Judge Weinstein who, at the close of his opinion in *Harris* noted: "Responsibility for any change in the statutory balance lies with Congress, not the courts."⁸⁴

We now turn to the implications of the Immunities Act for air carriers and manufacturers in the aviation field. At the present time there are approximately one hundred major foreign air carriers and fifty major foreign air frame and component suppliers operating in the world.⁸⁵ Many of them probably have standing to claim the benefits of the Immunities Act, not the least of which is foreign sovereign immunity.⁸⁶ For example, assuming that a waiv-

⁸⁴ 481 F. Supp. at 1066.

⁸⁵ Fingert, *WORLD AVIATION DIRECTORS 251-75* (Summer 1980); Sweetman, "Commercial Aircraft of the World," *FLIGHT INTERNATIONAL*, October 25, 1980, at 1575-1638; see also *FORTUNE*, April 9, 1979, at 102, 104-10.

⁸⁶ For example, the following 14 foreign air carriers appear to be 100% state owned:

Arelinte Eireann	***Ireland
Aeromexico	Mexico
Aero Peru	*Peru
Air Canada	**Canada
Air India	India
Air New Zealand	New Zealand
Argentine Airlines	Argentina
British Airways	United Kingdom
British West Indian	Trinidad and Tobago
Iran Air	***Iran
Lan-Chile	**Chile
Nigeria Airways	Nigeria
Olympic	***Greece
Quantas	Australia

The following 14 foreign air carriers appear to be at least majority state-owned by the percentage shown:

Air France	France	98.55
Air Jamaica	Jamaica	60.00
Air Pacific	Fiji	60.69
Air Zaire	Zaire	64.00
Alitalia	***Italy	75.50
Bahamasair	Bahamas	84.00

er has not occurred, sovereign immunity should, in general, be a defense for a majority foreign state air carrier or manufacturer in an action arising out of an extraterritorial accident.⁸⁷ In that case, a plaintiff would find no relief under the three commercial activity exceptions found in section 1605(a)(2). This conclusion is based on the following reasons. First, since the underlying tortious act took place outside the territory of the United States, our hypothetical tort claim would not be based upon the foreign state's commercial activity in the United States. Second, since clause two requires that the situs of the accident be in the United

Dutch Antillean Air	***Netherlands	96.00
Finnair	Finland	73.00
KLM	***Netherlands	70.00
Lufthansa	***Germany	74.31
Pakistan International	Pakistan	90.00
Royal Air Maroc	Morocco	67.73
Sabena	Belgium	65.00
Viasa	Venezuela	55.00

The following nine foreign air carriers appear to be over 50% state-owned, but their exact ownership interests are not clear:

Aeroflot	U.S.S.R.
Avianca	Columbia
Czechoslovak Airlines	Czechoslovakia
El Al	***Israel
Iberia	Spain
LOT	Poland
South African Airways	South Africa
TAP	Portugal
TAROM	Romania

* This foreign state is not a party to the Warsaw Convention.

** These foreign states have exercised a reservation of rights pursuant to the Additional Protocol, *see* Part V., sub. (c) *infra*.

*** These foreign states have expressly waived their immunity. *See* notes 99-111 *infra*, and accompanying text.

U.S. DEPT. OF TRANSPORTATION, CAB, BUREAU OF INTERNATIONAL AFFAIRS, GOVERNMENTAL OWNERSHIP, SUBSIDY, AND ECONOMIC ASSISTANCE IN INTERNATIONAL COMMERCIAL AVIATION (1975). *See* note 54 *supra*.

Among the component and airframe manufacturers, here and abroad, are Aerospatiale, Airbus Industrie, Antanov, Avions Marcel, British Aerospace, British Hovercraft, Casa/Nurtanio, de Havilland Canada, Embraer, Ilyushin, People's Republic of China, PEZETEL, Rolls Royce, Shorts, Tupolev and Yakovlev. *See* note 85 *supra*.

⁸⁷ *Cf. Perez v. Bahamas*, 482 F. Supp. 1208 (D.D.C. 1980) (a minor suffered personal injuries when the defendant's police craft fired on a fishing boat located less than one-half mile from Great Isaac Cay, The Bahamas; the court held that under § 1605(a)(5), the injury did not arise within the United States and sustained immunity).

States, that clause would be inapplicable.⁸⁸ Third, the presence of an aggrieved party in the United States would not support the "direct" effect requirement of clause three. As an ineluctable result, an aggrieved shipper or passenger would be totally without remedy, unless a waiver of immunity existed in American federal and state courts for damages arising out of an extraterritorial accident involving a foreign state air carrier or manufacturer.

The interplay between the Federal Aviation Act of 1958 (Aviation Act),⁸⁹ Treaties of Friendship, Commerce and Navigation,⁹⁰ and the Convention for Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention),⁹¹ on the one hand, and the Immunities Act, on the other hand, will be the source of both explicit and implicit waivers of foreign sovereign immunity in an American court. With respect to this waiver issue, two sections of the Immunities Act are pertinent. Section 1604 provides:

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.⁹²

In addition, section 1605 provides:

- (a) A foreign state shall not be immune from the jurisdiction of the 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 . . . ;⁹³

⁸⁸ Compare 28 U.S.C. § 1605(a)(2), cl. 2 (1976) with 28 U.S.C. § 1605(a)(5) (1976). *E.g.*, *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) (no immunity from liability arising out of an assassination in the United States).

⁸⁹ 49 U.S.C. § 1301 (1976).

⁹⁰ See text accompanying notes 99-111 *infra*.

⁹¹ Adherence, October 29, 1934, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11. The Warsaw Convention was concluded at Warsaw, Poland on October 12, 1929. For a lively discussion of the historical background of this and related treaties see Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 J. AIR L. & COM. 807 (1980).

⁹² 28 U.S.C. § 1604 (1976).

⁹³ 28 U.S.C. § 1605(a)(1) (1976).

We now turn to these three sources of waiver of foreign sovereign immunity.

A. Aviation Act

The Aviation Act is a source of an express waiver of immunity for foreign state air carriers. Under the Aviation Act no foreign air carrier navigating an aircraft in the United States is permitted to engage in "foreign air transportation"⁹⁴ unless it holds a permit issued by the Civil Aeronautics Board (Aeronautics Board).⁹⁵ Pursuant to the authority delegated it by Congress through the Aviation Act, the Aeronautics Board issued a regulation requiring owners and operators of air carriers that are owned by foreign states and that engage in foreign air transportation to waive immunity expressly for any claim that might arise out of the carrier's activities under the permit.⁹⁶ Some legal experts have suggested that a foreign state owning or operating an air carrier does not have the right to plead the defense of sovereign immunity.⁹⁷ These opinions have been based upon the broad proposition that such an owner or operator, merely by holding a permit, waives its immunity for all purposes when it is sued in the United States. Such arguments ignore a critical issue. The Aviation Act defines foreign air transportation as carriage between the United States and a point outside the United States.⁹⁸ The regulation incorporating that

⁹⁴ "Foreign air transportation" means the carriage by aircraft of persons or property between "a place in the United States and any place outside thereof. . . ." 49 U.S.C. § 1301(24)(c) (Supp. III 1979).

⁹⁵ 49 U.S.C. § 1372(a) (1976).

⁹⁶ 14 C.F.R. § 375.26 (1980) provides:

Waiver of sovereign immunity. By navigating a foreign civil aircraft in the United States pursuant to authorization granted by or under this part, the owners and operators of such aircraft when engaged in proprietary or commercial activities waive any right they may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against any of them in any court or other tribunal in the United States, based upon any claim arising out of operations by such persons pursuant to such authorization.

(emphasis supplied).

⁹⁷ 2 S. SPEISER & C. KRAUSE, AVIATION TORT LAW 465 (1979). See *Hearings*, *supra* note 36, at 51 where a similar position is taken by Mr. Bruno A. Ristau, Chief of the Foreign Litigation Unit in the Civil Division of the Department of Justice. His office is charged with the responsibility of representing the United States in civil suits brought against it in foreign courts.

⁹⁸ *E.g.*, *Pan American Airways, Inc. v. United States*, 150 F. Supp. 569, 572 (Cust. Ct. 1957).

definition governs only foreign air transportation and does not purport to regulate flights carried on wholly outside the United States. Accordingly, since the Aviation Act and this regulation are limited by their terms, an express waiver of immunity pursuant to this regulation will occur only under circumstances where, on a given flight, the United States is an actual stopping place, point of departure, or point of destination.

B. *Treaties of Friendship, Commerce and Navigation*

A Treaty of Friendship is a source of an express waiver of immunity for both foreign state air carriers and manufacturers. The United States has concluded numerous bilateral Treaties of Friendship, Commerce and Navigation. Ten of these treaties contain express waivers of sovereign immunity by the foreign state party. These waivers provide, in substance, that no enterprise owned by a party, if it engages in commercial activity within the territory of the other state, will claim sovereign immunity from suit.⁹⁹ Treaties of Friendship, Commerce and Navigation containing this express waiver have been concluded with the Western European states of Germany,¹⁰⁰ Ireland,¹⁰¹ Italy,¹⁰² and The Netherlands,¹⁰³ and with

⁹⁹ *E.g.*, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States—Ireland, 1 U.S.T. 785, 797 T.I.A.S. No. 2155, 206 U.N.T.S. 269, 288, art. XV, para. 3 reads:

No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial manufacturing, processing, shipping or other business activities within the territories of the other Party claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

(emphasis supplied). By ignoring the fact that these treaties require some contact with the United States, this language has been too narrowly interpreted. *E.g.*, *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 985 (N.D. Ill. 1980).

¹⁰⁰ Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States—Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3, 26, art. XVIII, para. 2.

¹⁰¹ Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States—Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155, 206 U.N.T.S. 269, 288, art. XV, para. 3.

¹⁰² Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States—Italy, T.I.A.S. No. 1965, 79 U.N.T.S. 171, 210, art. XXIV, para. 6.

¹⁰³ See note 111 *infra*, and accompanying text.

Greece,¹⁰⁴ Iran,¹⁰⁵ Israel,¹⁰⁶ Japan,¹⁰⁷ Korea,¹⁰⁸ and Nicaragua.¹⁰⁹ Typically these waivers encompass all types of entities and commercial activity.

In one instance foreign sovereign immunity was specifically addressed on a government-to-government basis. This was achieved, not through the customary federal Aeronautics Board permit system discussed earlier, but through a special air transportation agreement. On June 19, 1953, the United States and The Netherlands, by an exchange of diplomatic notes, effected an agreement concerning air transport activities.¹¹⁰ By this Dutch-American exchange, the parties agreed that no air carrier owned by a party, if it engages in air transportation into or through the territory of the other state, would assert the defense of sovereign immunity from

¹⁰⁴ Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States—Greece, 5 U.S.T. 1829, 1867, T.I.A.S. No. 3057, 224 U.N.T.S. 279, 314, art. XIV, para. 5.

¹⁰⁵ Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States—Iran, 8 U.S.T. 899, 909, T.I.A.S. No. 3853, 284 U.N.T.S. 93, 126, art. XI, para. 4.

¹⁰⁶ Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States—Israel, 5 U.S.T. 550, 570, T.I.A.S. No. 2948, 219 U.N.T.S. 237, 276, art. XVII, para. 3.

¹⁰⁷ Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States—Japan, 4 U.S.T. 2063, 2077, T.I.A.S. No. 2863, 206 U.N.T.S. 143, 214, art. XVIII, para. 2.

¹⁰⁸ Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States—Republic of Korea, 8 U.S.T. 2217, 2230, T.I.A.S. No. 3947, 302 U.N.T.S. 281, 326, art. XVIII, para. 2.

¹⁰⁹ Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States—Nicaragua, 9 U.S.T. 449, 463, T.I.A.S. No. 4024, 367 U.N.T.S. 3, 26, art. XVIII, para. 3.

¹¹⁰ The Government of the United States and the Government of The Netherlands agreed

that neither Government will assert on behalf of any *air carrier enterprise* of its nationality, which engages in *air transport operations* into or through the territory of the other, the defense of sovereign immunity from suit in any action or proceeding entered into against such air carrier enterprise in any court or other tribunal of the other Government (or in the latter's territories or possessions) *based upon any claim arising out of the air carrier's operations to and from the territory of the United States or the Netherlands, as the case may be*, and further agree that neither Government will authorize any such air carrier to assert any such defense in its own behalf.

(emphasis supplied). Agreement effected by exchange of notes (concerning air transport services), June 19, 1953, United States—Netherlands, 4 U.S.T. 1610, 1611, T.I.A.S. No. 2828, 212 U.N.T.S. 249, 250.

suit based on any claim arising out of the carrier's operations to and from the territory of either state.

Differences existed between the scope of the waivers expressed in the Treaties of Friendship, Commerce and Navigation and that expressed in the Dutch-American exchange of notes. First, the treaties govern off types of commercial activity, while the notes dealt only with air transportation. Second, the treaties govern all types of commercial entities, while the notes dealt only with air carriers. By their terms the notes did not reach other types of entities in the air transportation industry, such as air frame manufacturers and component part suppliers. Third, the treaties, in order to become applicable, merely require that each state conduct some commercial activity within the territory of the other state. There is no requirement that the claim giving rise to the suit be related to the commercial activity previously conducted in the other state. In the notes, however, the claim and the commercial activity had to be somehow related.

Apart from the differences in the breadth of activities and entities governed by these instruments, the absence of a requirement in the treaties for a connection between the claim and the commercial activity makes the treaty waivers substantially broader than the waiver found in the notes. These differences were apparently appreciated by the United States and The Netherlands. On March 27, 1956, they concluded a Treaty of Friendship, Commerce and Navigation.¹¹¹ This treaty, like the others just discussed, contains a waiver of foreign sovereign immunity which is very broad as to both the entities and the activities of the foreign state in question.

C. *The Warsaw Convention System*

The Warsaw Convention is a source of an implied waiver of immunity for foreign state air carriers. The United States is a party to the Warsaw Convention.¹¹² Since commercial air transportation frequently involves tickets reflecting international transportation,¹¹³ it is important to consider the manner in which the issue of

¹¹¹ Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States—The Netherlands, 8 U.S.T. 2043, 2073, T.I.A.S. No. 3942, 285 U.N.T.S. 231, 259, art. XVIII, para. 2.

¹¹² *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 853 (2d Cir.), cert. denied, 382 U.S. 816 (1965).

¹¹³ "International transportation" is defined in Art. 1(2) as follows:

foreign sovereign immunity enters the Warsaw Convention system. Since foreign sovereign immunity is a defense which is personal, it may be waived by the state. Thus, it is necessary to examine the circumstances under which the Warsaw Convention may embody a waiver of foreign sovereign immunity through a concession by a foreign state air carrier to be sued in a given forum.

The Warsaw Convention is a treaty designed to regulate in a uniform manner the conditions of international transportation by air carriers for hire.¹¹⁴ It does not apply to aircraft manufacturers or suppliers.¹¹⁵ Reduced to its most elementary form, it provides that there shall be a rebuttable presumption of liability of the carrier and a monetary limit of the recovery which a passenger or shipper may obtain.¹¹⁶ Like private rights, a treaty may confer rights capable of enforcement in an American court without implementing statutes.¹¹⁷ The Judiciary has always construed a treaty as any other contract.¹¹⁸

1. Article 2 (1)

Initially it should be noted that Article 2(1) of the Warsaw Convention provides:

This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1 [*i.e.*, international transportation].¹¹⁹

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there is a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 U.N.T.S. 11 [hereinafter cited as the Warsaw Convention].

¹¹⁴ Article 1(1) provides: "This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." *Id.*

¹¹⁵ *In re Paris Air Crash*, 399 F. Supp. 732, 747 (C.D. Cal. 1975).

¹¹⁶ Warsaw Convention, *supra* note 113, arts. 17, 20, 21 and 22.

¹¹⁷ *E.g.*, *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 470 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470 (1941).

¹¹⁸ *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921).

¹¹⁹ Warsaw Convention, *supra* note 113, Art. 2(1).

By virtue of this paragraph, every contracting foreign state, which has not reserved its rights pursuant to the Additional Protocol, would be deemed to have submitted itself to an Article 28 forum.

In order to understand fully the concept of consent to be sued and thus waiver of foreign sovereign immunity, it is necessary to distinguish carefully between subject matter and in personam jurisdiction. It is the current American view to require a court to undertake a three part test to determine whether it has subject matter and in personam jurisdiction and therefore complete power to determine the rights at stake in a Warsaw Convention case.¹²⁰ To satisfy the first part of the test, the passenger or shipper must first establish that the American court has treaty jurisdiction.¹²¹ Article 28(1) of the Warsaw Convention provides:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.¹²²

Since, in the case of a foreign state carrier, "the domicile of the carrier" and probably "his principal place of business" are, by definition, outside the United States, these forums may be eliminated from this discussion. Accordingly, the Article 28 court will probably be American only when the "place of business through which the contract has been made, or . . . the place of destination" is in the United States. Second, the plaintiff must show that the American court has jurisdiction in the domestic sense.¹²³ Third, the plaintiff must show that the American court has in personam jurisdiction over the person of the defendant.¹²⁴

With respect to the first issue, treaty jurisdiction, the plaintiff

¹²⁰ See *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971).

¹²¹ *Id.* Of course, the plaintiff must also show that there was an "accident" and that it took place on board the aircraft or in the course of embarking or disembarking. Warsaw Convention, *supra* note 113, art. 17. See McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963).

¹²² Warsaw Convention, *supra* note 113, art. 28(1).

¹²³ *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971).

¹²⁴ *Id.* at n.4. Under the Immunities' Act these three prongs are interconnected. See note 37 *supra*.

must bring suit in an Article 28 court.¹²⁵ With respect to the second issue, domestic jurisdiction, when Congress has not vested exclusive subject matter jurisdiction in the federal courts, the state courts will generally have the power to hear the case.¹²⁶ Since the power to hear claims against foreign states or cases arising under the Warsaw Convention has not been committed exclusively to the federal courts, the state courts retain the power to hear these types of cases.¹²⁷ Moreover, the federal courts, although courts of limited subject matter jurisdiction, also have the power to hear a case arising under the Warsaw Convention, regardless of the citizenship of the parties.¹²⁸ Accordingly, subject matter jurisdiction in both the treaty and domestic sense in the American courts should not pose a serious problem under the Warsaw Convention.

The third prong of the jurisdictional test involves a showing by the plaintiff that the court has in personam jurisdiction over the air carrier.¹²⁹ Both in personam jurisdiction over a foreign state air carrier and foreign sovereign immunity involve the notion of consent to be sued. Article 2(1) of the Warsaw Convention makes the entire treaty applicable to "transportation performed by the state." If this clause means anything, it must mean transportation performed by air carriers owned and operated by the state. It is at this point that the Warsaw Convention of 1929 and the Immunities Act of 1976 join hands. One of the means by which a defendant may voluntarily submit to the jurisdiction of a forum is through a forum selection clause in a contract.¹³⁰ The Supreme

¹²⁵ 452 F.2d at 800.

¹²⁶ See generally, 1A MOORE'S FEDERAL PRACTICE § 0.201-0.202 (2d ed. 1980).

¹²⁷ A claim against a foreign state may be brought in either a state or federal court. See 28 U.S.C. § 1604 (1976). A claim arising under the Warsaw Convention may be brought in either a state court, e.g., *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974), or a federal court, e.g., *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

¹²⁸ *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979). Congress, through the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369, has eliminated the amount in controversy requirement for federal question jurisdiction. However, in the absence of a claim arising under federal law, an alien may not claim federal question subject matter jurisdiction by anticipating the defense of foreign sovereign immunity under the Immunities Act. *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413 (2d Cir. April 16, 1981).

¹²⁹ 452 F.2d at 800 n.4.

¹³⁰ E.g., *Berner v. United Airlines, Inc.*, 2 Misc. 2d 260, 149 N.Y.S.2d 335

Court of the United States has interpreted such clauses as agreements to submit voluntarily to the power of the selected tribunal.¹³¹ The Court has declared that such a clause is enforceable unless it can be shown to be unreasonable.¹³² While the Court did not announce this rule without qualifying language,¹³³ it clearly sanctioned such clauses. In the context of international transportation "[t]he common denominator of all Warsaw contracts of carriage is the consent of the carrier to transport the passenger (or goods) and the consent of the passenger (or shipper) that the transportation take place. . . ."¹³⁴ Therefore, the limits of liability, the waiver of certain defenses, the possible judicial forums available to the plaintiff and the remainder of the treaty's apparatus flow from a consensual relationship between the parties created by the contract of carriage that incorporates the Warsaw Convention.¹³⁵

Section 1604 of the Immunities Act provides that a foreign state's claim to foreign sovereign immunity is subject to existing international agreements to which the United States is a party at the time of the enactment of the Immunities Act.¹³⁶ A plaintiff in a position to invoke the Warsaw Convention against a foreign state air carrier should be able, through section 1604, to overcome the defense of foreign sovereign immunity. This view is supported by Article 2(1) that specifically governs the rights of the passenger

(Sup. Ct. N.Y. Co.), *aff'd*, 3 A.D.2d 9, 157 N.Y.S.2d 884 (1st Dept. 1956), *aff'd*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340 (1957).

¹³¹ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Compare *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980); *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980); and *Iptrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (forum selection, made in an arbitration clause in a contract, constituted an implied waiver of foreign sovereign immunity) with *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 987-88 (N.D. Ill. 1980) and *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, No. 80-7413 (2d Cir. April 16, 1981) (agreement to be sued outside the United States is not a waiver of immunity from suit in the United States).

¹³² *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

¹³³ *Id.* at 17.

¹³⁴ *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 334 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

¹³⁵ By settling, in advance, the applicability of the Warsaw Convention, it becomes independent of "fortuitous events." *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 166, 287 N.Y.S.2d 14, 17 (1967), *cert. denied*, 390 U.S. 1039 (1968).

¹³⁶ 28 U.S.C. § 1604 (1976).

or shipper and transportation performed by the state through its state air carriers and also by Article 28(1), incorporated in the contract of carriage, that contains a forum selection clause. As a result, when a foreign state is a party to the Warsaw Convention, without a reservation pursuant to the Additional Protocol, an American Article 28 court may properly pierce any immunity that a state air carrier might otherwise enjoy.

2. *The Additional Protocol*

Article 2(1) of the Warsaw Convention makes the Convention expressly applicable to "transportation performed by the state or by legal entities constituted under public law." This generalization, however, is subject to an important qualification. The Additional Protocol of the Warsaw Convention provides:

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.¹³⁷

The Additional Protocol gives a signatory the right to make such a reservation at the time of ratification or adherence. Ratification of the Warsaw Convention without an exercise of the right found in the Additional Protocol is no reservation.¹³⁸ In practice, only a small number of states have availed themselves of this right. They include Canada, Chile, the Congo, Cuba, Ethiopia, Malaysia, the Philippines and the United States.¹³⁹

During the Second International Conference on Private Air Law during October 4-12, 1929 at Warsaw the British Delegate, Sir Alfred Dennis, proposed the reservation now found in the Additional Protocol. The minutes of the conference are revealing:

Mr. DeVoe—Report Officer—At Article 2, we have a British proposition which consists of reserving to the Government of the United Kingdom the right not to apply the Convention in the case of transportation performed by the State.

¹³⁷ Warsaw Convention, *supra* note 113.

¹³⁸ *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienn*e, 242 F. Supp. 129, 146 (E.D.N.Y. 1965).

¹³⁹ SHAWCROSS & BEAUMONT, *AIR LAW* (4th ed. 1977) Appendix C, A16E-A25.

This reservation is very serious. In the case of the transportation performed by the State for any reason, by any part of the Government which might call upon the prerogatives of the Crown, the Convention shall not apply.¹⁴⁰

* * *

Mr. Giannini—Italy—

* * *

The British reservation has very great importance in practice; for the moment it has none, since there are no air transportation companies belonging to the state, but it may nevertheless happen.¹⁴¹

* * *

Mr. Ripert—France—It is true that as early as the first sessions the British Government has always indicated to us that it would request a reservation for transportation performed by the state; but I think that most of us had understood that it would be transportation performed by the State in public interest, in the interest of the State and not simply commercial transportation.

* * *

In the form in which it is presented right now, the reservation of the British Government tends to check the Convention every time the transportation is performed by an aircraft belonging to the state.

* * *

I am really sorry about this proposition because it is going to allow all the states which organized commercial transportation themselves to escape the rules of the Convention. . . .¹⁴²

The phrase carriage "performed directly by the state" has been considered by a number of American courts. Notably none directly involved a state that exercised its right under the Additional Protocol or owned or operated the aircraft involved in the suit. In *Mertens v. Flying Tiger Line, Inc.*¹⁴³ the defendant was a civilian owner and operator of an aircraft chartered by the United States government for the transportation of military cargo and personnel to military destinations outside the United States. The Second Circuit had to decide whether this carriage was "performed by the United States," thereby making the Warsaw Convention inapplicable.

¹⁴⁰ Minutes, Second International Conference on Private Air Law, in Warsaw, Poland, 97 (October 4-12, 1929) (Reprinted under the authority of the Secretary General of I.C.A.O. with the permission of the Republic of Poland, Warsaw 1930) [hereinafter cited as Minutes].

¹⁴¹ *Id.* at 98.

¹⁴² *Id.* at 98-99.

¹⁴³ 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

able by virtue of the Additional Protocol right previously exercised by the United States in 1934. The court rejected this contention by holding:

We are of the opinion, however, that the transportation was performed by the Flying Tiger Line, the owner and operator of the aircraft, and that it was performed *for* the United States, not *by* the United States.¹⁴⁴

In *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*¹⁴⁵ Sabena's aircraft crashed in Belgium. The plaintiffs argued that Sabena, an airline owned by Belgium, should not be protected by the Warsaw Convention because Belgium allegedly invoked the Additional Protocol. This argument was quickly answered: "Belgium . . . did not exercise the right to such exemption when it ratified the Convention and the Additional Protocol in 1936."¹⁴⁶ After having held that the Additional Protocol was irrelevant to the case, the United States District Court for the Eastern District of New York observed:

However, the legislative history surrounding the formulation of the Additional Protocol, as well as a reading of that Protocol in conjunction with Article 2(1), indicates that such an exemption would not apply to "legal entities constituted under public law" acting in a purely commercial character, notwithstanding partial or even complete state ownership therein. See Cheng, XI Current Legal Prob. 225, 254 (1958) . . . ; Shawcross & Beaumont, Air Law § 324 n. (a) at p. 300 (2 ed. 1951).¹⁴⁷

In *Warren v. Flying Tiger Line, Inc.*,¹⁴⁸ defendant's aircraft departed from California carrying soldiers destined for Saigon *via* Honolulu, Wake Island, Guam and Manila. The plane disappeared. The United States government had entered into an agreement with the carrier for the transportation of these passengers.¹⁴⁹ The plaintiffs contended that the "flight is subject to the reservation that the Convention does not apply to international transportation which is

¹⁴⁴ *Id.* at 853 (italics original).

¹⁴⁵ 242 F. Supp. 129 (E.D.N.Y. 1965).

¹⁴⁶ *Id.* at 147.

¹⁴⁷ *Id.*

¹⁴⁸ 234 F. Supp. 223 (S.D. Cal. 1964), *rev'd on other grounds*, 352 F.2d 494 (9th Cir. 1965).

¹⁴⁹ *Id.* at 224-25.

performed by the United States.¹⁵⁰ The United States District Court for the Southern District of California rejected this argument: "the chartered flight in the instant case was not . . . performed directly by the state."¹⁵¹

It is apparent that the question of when a state, pursuant to the Additional Protocol, has directly performed international transportation has not been answered by an American court. Neither Mr. Cheng¹⁵² nor Messrs. Shawcross & Beaumont,¹⁵³ the British writers, present authority which has answered this question. When the foreign state in question owns and operates, not merely char- ters, an aircraft, the state should be considered as having directly provided this transportation. It is submitted that when a foreign state owns and operates an air carrier which provides international transportation, then that is "transportation by air performed di- rectly by the state." Accordingly, when a foreign state is a party to the Warsaw Convention, with a reservation pursuant to the Additional Protocol, the Convention should not be a source of waiver of immunity.

3. *Non-Parties to the Warsaw Convention*

The Warsaw Convention is a contract among nations. A prob- lem presents itself when a foreign state air carrier promises inter- national transportation, becomes involved in an accident, but is not a party to the Warsaw Convention. Since subject matter juris- diction of an American court involves the question of the court's inherent power to hear a case, the consent of a defendant alone cannot confer subject matter jurisdiction. In the Warsaw Con- vention context it is too late in the day to argue that Article 28 is any- thing less than an absolute mandate on American courts of subject matter jurisdiction over a claim involving international trans- portation.¹⁵⁴ This obligation exists because the United States, being

¹⁵⁰ *Id.* at 231.

¹⁵¹ *Id.* at 232.

¹⁵² Cheng, *State Ships and State Aircraft*, XI CURRENT LEGAL PROBLEMS 225 (1958), cited in *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129, 147 (E.D.N.Y. 1965).

¹⁵³ SHAWCROSS & BEAUMONT, AIR LAW 324 (2d ed. 1951), cited in *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129, 147 (E.D.N.Y. 1965); SHAWCROSS & BEAUMONT, AIR LAW 422 (4th ed. 1977).

¹⁵⁴ *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971). 1971).

a party to the Warsaw Convention, has a treaty-based duty to keep the doors of its federal and state courts open to such claims. As a result, a foreign state's failure to become a party to the Warsaw Convention should not affect an American court's subject matter jurisdiction to hear a claim against its majority-owned air carrier.

Despite the existence of this American treaty-based obligation when a foreign state is not a party to the Warsaw Convention it would not appear that it has agreed to submit itself to an American Article 28 court under the Warsaw Convention as envisioned by section 1604¹⁵⁵ or to have waived its immunity as envisioned by section 1605(a)(1) of the Immunities Act. There is no language in the Warsaw Convention which evinces an intention by the parties to bind non-parties to the Convention. Articles 37 through 41 indicate the manner by which a foreign state can become a party. Article 37(2) is pertinent:

As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.¹⁵⁶

Although Article 1(2) defines international transportation and does not expressly exclude non-party foreign states, the Warsaw Convention must be considered as an integrated instrument. Article 1 does not attempt to define the states which are covered by the Convention. For this reason Articles 37 through 41 are important. These articles show that the Warsaw Convention binds only Convention parties. The intention to have the Warsaw Convention bind only parties is shown further by Article 1(2). Under that article the Convention is not applicable to the contract of carriage when the point of departure or destination of an international flight is within the borders of a non-party, *e.g.*, round-trip transportation to and from a non-party with a stopping place in a party. In addition, the minutes of the conference show:

¹⁵⁵ See also *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 390 (D.N.J. 1979).

¹⁵⁶ Warsaw Convention, *supra* note 113, art. 37(2).

Mr. Richter—Germany—Before signing the Convention, I would like to have this declaration inserted in the minutes: Germany reserves the right not to apply the Convention with respect to a state which uses the reservation regarding Article 2 set out in the Additional Protocol.¹⁵⁷

Since the Warsaw Convention is a contract among nations, non-parties should not be bound by its implied waiver term.¹⁵⁸ To hold otherwise would be equivalent to binding a state to an agreement to which it is not even a party.¹⁵⁹ As a result, when a foreign state is not a party to the Warsaw Convention, the Convention should not be the source of a waiver of immunity.

4. *The Montreal Agreement*

The Agreement Relating to Liability of the Warsaw Convention and the Hague Protocol (Montreal Agreement)¹⁶⁰ is not a source of waiver of foreign sovereign immunity. The Montreal Agreement applies "to a particular type of Warsaw Convention international transportation, namely, that which involves a point of origin, point of destination, or agreed stopping place in the United States."¹⁶¹ The Montreal Agreement, unlike the Warsaw Convention, is neither a treaty nor a treaty amendment. Instead, it is an agreement by international air carriers to waive certain defenses in return for a limitation of liability in the event of an action alleging a breach of duty and damages therefrom.¹⁶² By definition the Montreal Agreement comes into play against a foreign state air carrier only after a plaintiff has established both subject matter jurisdiction under the Warsaw Convention and in personam jurisdiction under the Im-

¹⁵⁷ Minutes, *supra* note 140, at 151.

¹⁵⁸ It is submitted that *Glenn v. Compania Cubana de Aviacion, S.A.*, 102 F. Supp. 631 (S.D. Fla. 1952), holding that an air carrier owned by a non-party is protected by the Warsaw Convention, was wrongly decided. The two cases cited in *Glenn* to support this view—*Garcia v. Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S.2d 317 (2d Dept. 1945), *aff'd*, 295 N.Y. 852 (1946), *cert. denied*, 338 U.S. 824 (1949), and *Grein v. Imperial Airways, Ltd.*, 1 Av. L. REP. (CCH) ¶ 622 (Court of Appeals, England, 1936)—are inapposite. Both cases involved air carriers of parties.

¹⁵⁹ *Sullivan v. Kidd*, 254 U.S. 433 (1921).

¹⁶⁰ Agreement, C.A.B. No. 18900, approved by the Civil Aeronautics Board, May 13, 1966.

¹⁶¹ *Tompkins, The Aftermath of a Hijacking—Passenger Claims and Insurance*, 39 J. AIR L. & COM. 381, 388 (1973).

¹⁶² *Id.* at 390.

munities Act. In short, the Montreal Agreement does not establish any jurisdiction, but merely assumes its presence. Since the Montreal Agreement does not embody any notion of consent to be sued, it should not be considered, like the Warsaw Convention, to be a source of waiver of foreign sovereign immunity pursuant to either section 1604¹⁶³ or section 1605(a)(1)¹⁶⁴ of the Immunities Act.

VI. SUGARMAN V. AEROMEXICO

In any body of law, particularly an emerging one, it is important to build firm foundations. Unfortunately, the issue of foreign sovereign immunity has become murky as applied to foreign state air carriers. To date, there has been only one case under the Immunities Act that squarely decided the question of an air carrier's right to foreign sovereign immunity. This case substantially conflicts with the line of cases exemplified by *Harris*.

In *Sugarman v. Aeromexico, Inc.*¹⁶⁵ the plaintiff sued an air carrier that was a foreign state within the meaning of the Immunities Act.¹⁶⁶ He purchased his Aeromexico round-trip ticket to Acapulco in New Jersey.¹⁶⁷ During the last twenty-four hours of his trip he suffered injuries while awaiting his flight back to New York.¹⁶⁸ The United States District Court for the District of New Jersey dismissed Sugarman's complaint. It held that Aeromexico was a foreign state and that none of the three excepting clauses of section 1605(a)(2) applied to the case.¹⁶⁹ Further, there was no waiver of immunity under the circumstances.

On appeal, the United States Court of Appeals for the Third Circuit reversed and reinstated the complaint. It agreed with the district court that neither clause two, requiring an action to be

¹⁶³ 28 U.S.C. § 1604 (1976).

¹⁶⁴ 28 U.S.C. § 1605(a)(1) (1976).

¹⁶⁵ 626 F.2d 270 (3d Cir. 1980).

¹⁶⁶ Aeromexico, Inc. is the national airline of the Republic of Mexico and is a common carrier of passengers between Mexico and the United States. *Id.* It is a Mexican corporation and is wholly-owned by Mexico, *id.* at 271, and is, therefore, a "foreign state" within the meaning of 28 U.S.C. § 1603(a) and (b) (1976).

¹⁶⁷ 626 F.2d at 273.

¹⁶⁸ Sugarman alleged that Aeromexico caused him "to wait for 15 hours under extremely brutal conditions." *Id.* at 271. He allegedly suffered "cardiac insufficiency, angina and arrhythmia." *Id.*

¹⁶⁹ *Id.* at 272.

based on an act performed in the United States, nor clause three, requiring a direct effect in the United States, applied to Sugarman's claim.¹⁷⁰ After finding that Sugarman's claim was "based upon" a commercial activity in the United States, the court of appeals held that his claim could be maintained under clause one of section 1605(a)(2).¹⁷¹ In deciding that clause one vitiated Aeromexico's claim of immunity, the court ruled that there was a link between Aeromexico's alleged tortious conduct in Mexico and its commercial operations in the United States.¹⁷²

Clearly, Aeromexico engaged in commercial activity in the United States. For the court, Sugarman's ticket purchase in the United States created the required nexus between his injury and Aeromexico's domestic commercial operations. Under the court's reasoning, the only way to hold otherwise would be to construe clause one as requiring a domestic injury situs. The court concluded that if Congress intended clause one to apply only to domestic misconduct, it would have spelled out that intention more definitely.

It is significant that the *Harris* analysis is directly opposite to the *Sugarman* court's view of clause one. In *Harris* the court held that under clause one the action must be "'based upon' the specific commercial activity" carried on in the United States.¹⁷³ It is not enough that the action be *connected with* such domestic business. According to *Harris*, clause one was not designed to function like the "doing business" jurisdictional basis whereby jurisdiction could be predicated on "systematic and continuous" contact with the forum. Significantly, the court in *Harris* was able to marshal considerable legislative and judicial history for its view of clause one, while in *Sugarman* the court relied on its own notion of statutory construction and on a now useless relic, the Tate letter.

Sugarman is susceptible to criticism on a number of salient grounds. The commercial activity out of which Sugarman's claim arose was the carrier's pre-flight ground operations in Acapulco. Despite the integration of the carrier's ticket sales and marketing

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 273.

¹⁷² *Id.*

¹⁷³ *Harris v. VAO Intourist*, 481 F. Supp. 1056, 1061 (E.D.N.Y. 1979) (emphasis supplied).

operations in the United States and its flights between the United States and Mexico, the relationship between those activities and the operation of the carrier's terminal in Mexico is tenuous. The thrust of Sugarman's suit was the carrier's alleged tortious breach of duty in Acapulco before Sugarman became a passenger on the return flight. The gravamen of his complaint was not a breach of the contract of carriage made in the United States. Instead, his claim was really based upon the carrier's tortious commercial activity in Mexico and not upon its contractual commercial activity in the United States. Accordingly, his claim did not fall within clause one because there was no close connection between the alleged extra-territorial tort and the domestic ticket purchase.¹⁷⁴

Congress decided to deal with actions based upon extra-territorial acts through clause three. As noted earlier, this clause provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States in any case. . . .

(2) in which the action is based . . . 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.

Sugarman's claim was founded upon an act outside the territory of the United States "in connection with,"¹⁷⁵ not "based upon,"¹⁷⁶ Aeromexico's commercial activity in the United States. This satisfied the first requirement of clause three. However, as shown by both *Upton*¹⁷⁷ and *Harris*,¹⁷⁸ Aeromexico's acts did not have a "direct" effect in the United States. This failed to satisfy the second requirement of clause three. Accordingly, the only clause directly applicable to Sugarman should have, as a matter of law, precluded him from any relief against Aeromexico. The foregoing

¹⁷⁴ *E.g.*, *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964); *Corke v. M. S. Song of Norway*, 435 F. Supp. 308, 310 (W.D.N.Y. 1977).

¹⁷⁵ 28 U.S.C. § 1605(a)(2), cl. 3 (1976).

¹⁷⁶ *Id.*, cl. 1.

¹⁷⁷ *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

¹⁷⁸ *Harris v. VAO Intourist*, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979). The author wishes to thank Aeromexico's attorneys for making available to him Aeromexico's brief and appendix which were submitted on plaintiff's appeal from the order dismissing the complaint.

analysis should cast doubt on the vitality of the *Sugarman* interpretation of clause one.

Finally, there probably could not have been any claim by Sugarman that Aeromexico had waived its immunity either expressly under the Aviation Act, because Aeromexico was not navigating under its Aeronautics Board permit, or implicitly under the Warsaw Convention, because at the time of his alleged injuries Sugarman was not "embarking" onto the aircraft within the scope of the Warsaw Convention. Moreover, since the United States and Mexico were not parties to a Treaty of Friendship, Commerce and Navigation, there was no express waiver of immunity.

VII. CONCLUSION

As noted, the questions of standing, the general rule of foreign sovereign immunity, its exceptions, and waiver of immunity are to be answered in that order. The identity of the defendant is critical, not only to the issue of standing, but also to the waiver question. The Aviation Act and the Warsaw Convention, sources of both explicit and implicit waivers of immunity, are relevant only to foreign state air carriers and not to manufacturers. In this connection it is doubtful, even in a case involving the Warsaw Convention, that the Convention would be a source of implicit waiver by a foreign state that has reserved its rights pursuant to the Additional Protocol or by a non-signatory. To hold otherwise would bind a foreign state to a contract to which the foreign state has either reserved its rights or is not even a party. In addition, a waiver of immunity with respect to a manufacturer will not be found among those instruments. On the other hand, Treaties of Friendship, Commerce and Navigation do not distinguish between foreign state air carriers and manufacturers. Yet, while the scope of their waiver provisions is broad, their applicability is limited because those treaties depend entirely on the identity of a group of ten foreign states.

The basis of the plaintiff's relationship with the air carrier is also important. The Warsaw Convention system is founded on the existence of a contract between a passenger or shipper and the air carrier that involves international transportation. Some passengers on a given flight, wholly within a foreign country, will, and others

will not, be traveling on a ticket reflecting international transportation. As a consequence, depending on the contents of the ticket, some passengers will be within, and others will be without, the Warsaw Convention system. This difference is crucial for determining, *inter alia*, whether in relation to a given passenger, the foreign state air carrier will be able to assert the defense of immunity.

Finally, any changes in the present statutory scheme will have to come from either the legislative or executive branch of our government. The legislative branch, by adding a "doing business" provision or by deleting the "direct" effect language from clause three of section 1605(a)(2), could limit foreign sovereign immunity to claims having little or no contact with the United States. The executive branch, through the Department of State and the cooperation of the Senate, could enter into additional Treaties of Friendship, Commerce and Navigation, each containing an express waiver encompassing all enterprises owned by a foreign state.

**Comments, Casenotes
and
Statute Notes**

