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

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ABSTRACT

This paper briefly explores the international and domestic legal responsibilities of both public and private parties in a space venture. It examines the doctrine of sovereign immunity in the United States and other countries in PPPs both outside and within the space industry context. Available waivers and exceptions from the doctrine are examined from the standpoint of maintaining a level playing field between all participants in a public private partnership.

I. INTRODUCTION

Increasingly important to the space industry are the hybrid entities known as public private partnerships, or P3s, that result along the spectrum between the public and private sectors. They are not new, nor peculiar to space ventures. P3s can be found in a wide range of applications, from public utilities, to infrastructure projects in developing countries, to social service delivery through the faith-based initiative in the United States.

Accountability in business is always a key concern, and certainly space business is no exception. If a government can avoid responsibility for its actions as a partner in space industry by invoking state immunity, the risks borne by the private side of the venture could be disproportionate to the possible upside potential. Such imbalance can create an uneven playing field and, perhaps, cripple commercial growth.

II. PUBLIC PRIVATE PARTNERSHIPS DEFINED

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

Whereas privatization is on a downward spiral,[4] public-private partnerships are now hailed as "the new paradigm for economic development in the 21st century…increasingly being used as a policy tool to transform the

role of national and local governments in public service delivery, infrastructure development, poverty alleviation, capital market improvement, and governance around the world."[5] This trend is global,[6] particularly in the European and Asian markets.[7]

Absent a universal legal definition of P3s, they are "generally recognized [to exist] wherever there is a contractual relationship between the public sector and a private sector company designed to deliver a project or service that traditionally is carried out by the public sector."[8]

P3s are creative arrangements. Usually, a governmental entity enters into contract with a private consortium which sets up a single purpose entity known as a special purpose vehicle (SPV). The private consortium is typically formed by a joint venture (JV) between a range of contractors, banks, investors, and suppliers willing to commit equity and/or resources to the project.[9]

Some underlying principles are indispensable to their success. Value for money (VFM) is crucial. It refers "to the best possible outcome after taking account of all benefits, costs and risks over the whole life of the procurement."[10] Risk is perceived from the public sector's perspective as "any event which jeopardizes the quality or quantity of service that they have contracted for: and from the private sector's perspective as any event which "causes the cash flow profile of the project to depart from the base case and jeopardize the debt servicing ability of the project or its ability to generate a dividend stream for shareholders."[11]

Internationally, examples of P3s abound. Commercial space mirrors this trend toward hybrid entities; examples can be found in a host of space applications encompassing remote sensing, international telecommunications, global navigation, proposed space solar power systems, and spaceports.

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

It is worth noting that the International Civil Aviation Organization (ICAO) listed sovereign immunity as an identified concern for GNSS in its Final Report on the Work of the Secretariat Study Group on Legal Aspects of CNS/ATM systems.[12] And, in litigation now before the US courts, an Israeli-owned and controlled remote sensing corporation, ImageSat, has claimed immunity in a shareholder's derivative action questioning business decisions.[13] An understanding of the background, purposes, and mechanics of government immunity can only help the space industry address these situations proactively.

III. GOVERNMENT IMMUNITY

A. Background

"Sovereign immunity encompasses immunity from both suit and liability."[14] A recognized state enjoys immunity from the jurisdiction of the courts of other states.[15] The doctrine can operate as a bar to actions between sovereigns, but is more often implicated in actions between private parties engaged in activities with governmental entities.

There are two schools of thought on the origin of the doctrine. One is based upon the theory that, as sovereign equals, one state cannot exercise authority over another,[16] while the other is based upon the common law tradition, originating with the Romans, that *rex non potest peccare*, or "the king can do no wrong."[17] Immunity can extend from the head of state to the government and its organs, the leader of the government (if a different person), ministers, officials, agents of the state for their official acts, some public corporations, and state owned property.[18]

Absolute immunity is just that – immunity for all government acts – "susceptible of no limitation not imposed by itself."[19] That view first appeared in US jurisprudence in an 1812 case, *The Schooner Exchange v. M'Faddon*,[20] and was fully embraced by 1926 in *Berizzi Brothers v. Steamship Pesaro*.[21] It is "the product of comity concerns, rather than a want of judicial power."[22]

However, the State Department and the United States Supreme Court were seemingly at odds in application of the immunity. The State Department was concerned that adjudications against foreign sovereigns could embarrass the executive arm of the government leading to the Supreme Court's reluctance to adjudicate at all.[23] By the mid-twentieth century, the Supreme Court recognized the commercial advantage that absolute immunity provided to foreign sovereigns over private businesses.[24] The State Department reconsidered its position, acknowledging the changes in the wind, and recognized that the extended immunities were based upon possibly outdated conceptions of sovereignty.[25]

The Acting Legal Advisor to the Department of State, Jack B. Tate wrote a letter to the Acting Attorney General in May 1952. While it expressed succinctly the shift from absolute to restrictive immunity, distinguishing between public and private acts of a state, it left unsettled the matter of who should determine whether immunity attached in a given situation – was it the courts or was it the State Department?[26]

For more than twenty years this ambiguity remained, allowing foreign states the alternative of seeking State Department approval for claims of immunity, which included the possibility that the Department would give in to political pressure. The European Convention on State Immunity, adopting restrictive state immunity, was signed by all members of the Council of Europe in 1972.[27] Eventually, the United States Congress in 1976 enacted the Foreign States Immunity Act, codifying the restrictive theory, thus reflecting the policy followed by a majority of States.

One of the most significant results of the Act was that it settled the question of where the determination of immunity would be made, placing the responsibility in the judicial system rather than in the State Department.[28]

The United Kingdom passed its State Immunity Act in 1978; Canada followed with its State Immunity Act in 1983. Both adopted restrictive

immunity. The United Nations Convention on the Jurisdictional Immunities of States and Their Property[29] in 2004, adopted by the General Assembly in 2005,[30] The new instrument, too, reflects the restrictive theory of state immunity.

The United States Supreme Court officially espoused restrictive immunity for foreign states in *Alfred Dunhill of London, Inc. v. Republic of Cuba*; the Court found that the case essentially dealt with an issue of immunity, which it denied because the conduct was commercial in nature.[31]

B. FSIA

The text and structure of the FSIA "demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in [US] courts."[32]

As a starting point, then, "a foreign state is presumptively immune from suit unless a specific exception applies."[33] Courts employ a burden-shifting analysis; the defendant foreign state "must first establish a prima facie case that it is a sovereign state, creating a rebuttable presumption of immunity. Once the foreign sovereign makes that prima facie showing of immunity, the plaintiff has the burden of production to make an initial showing that an FSIA exception to foreign immunity applies."[34] The court must resolve whether foreign sovereign status applies – a question of law – as a threshold matter.

Though not yet directly applied, in *Dole Food Co. v. Patrickson*,[35] the United States Supreme Court affirmed as correct the application of the five-factor framework used by federal appellate courts to determine whether an entity is an organ or instrumentality of the state as defined in § 1604(b) of the FSIA. The factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds some right in the [foreign] country; and (5) how the entity is treated under foreign state law.[36]

Some lower US courts have used "a 'characteristics' test, asking whether under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, and hold property in its own name."[37] Other courts, mainly appellate, have adopted a "core functions test" limiting inquiry to "whether the defendant is an integral part of a foreign state's political structure and function is predominately commercial."[38]

Instrumentality status is determined by the facts at the time the action is filed.[39] In other words, if the foreign state's interest in a corporation was not a majority interest until after filing, then the claim of instrumentality would more than likely fail. Likewise, if a foreign-state owned entity, such as an airline, is privatized after a claim arose, the claim would not lose its status under the FSIA.[40] Furthermore, the US Supreme Court held that control could not be substituted for ownership interest, and that a subsidiary of an instrumentality could not, itself, be found an "instrumentality" as it was too far removed.[41]

Because the FSIA grants subject matter jurisdiction over the foreign state, objection to this jurisdiction may be raised at any time.[42] And, before a court

may enter a default against a foreign state, the FSIA requires the plaintiff to establish his or her right to relief by evidence satisfactory to the court.[43] Once the defendant has made its case for immunity status, it is the plaintiff's burden to prove that one of the seven statutory exceptions applies, granting the court jurisdiction to hear the case. The commercial exception found in § 1605(a)(2) of the FSIA is the most significant of those enumerated.[44]

The courts have carved out definitions and tests to assure proper application of §§ 1603(d) and (e), and § 1605(a)(2) to the facts of a given case. Thus, in *Saudi Arabia v. Nelson*, the United States Supreme Court held that eligibility for the commercial exception required identification of the particular conduct upon which the claim was "based," or the gravamen of the complaint, as per the statutory language.[45] It is not enough that commercial activity have some loose connection to the basis of claim. The offending conduct must flow from genuine commercial activity. The statute expressly dictates that it is the nature of an act that determines its commercial character, not the purpose of that act.

The FSIA breaks the commercial activity exception into three alternative scenarios, each providing sufficient connection to the United States to afford a jurisdictional nexus. The commercial activity can be conducted in the United States by the foreign state; it can be an act performed in the United States but in connection with a commercial activity of the foreign state somewhere else; or, it can be predicated upon an act outside United States territory in connection with commercial activity of the foreign state elsewhere if that extra-territorial act caused a direct effect in the United States.[46]

In *Republic of Argentina v. Weltover*, the Supreme Court held that "an effect is direct if it follows as an immediate consequence of the defendant's ...activity."[47] This holding was expanded upon in *American Telecom Co. L.L.C. v. Republic of Lebanon*, a recent Sixth Circuit case, where that court applied the principle *de minimus non curat lex*, to ensure that jurisdiction was not based upon "purely trivial effects."[48] The court acknowledged the difficulty in applying *Weltover's* "immediate consequences" test and analyzed it in terms of another, the "legally significant act" test. The court found that second unnecessary, and held that

> the mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and therefore, does not "cause a direct effect in the United States" for the purposes of 28 U.S.C. § 1605(a)(2).[49]

Any discussion of adjudication over sovereign acts must include the act-of-state doctrine which "precludes [US] courts [] from inquiring into the validity of the public acts a recognized sovereign power committed within its own territory."[50] The act-of-state doctrine is important to consider when examining the types of actions for which a public partner in a P3 could be held accountable, even if a valid waiver is in place. In *Dunhill*, the United States Supreme Court was evenly divided on whether the commercial exception also

limited the availability of an act-of-state defense.[51] *Weltover* revisited the issue when forced to rule on whether Argentina's issuance of commercial bonds to raise capital for its economy, and its unilateral extension of the time to pay on those bonds, was an act of a sovereign to fulfill its obligations when confronted with a national credit crisis, an act of state, or simply a commercial decision which any issuer of debt instruments could make.[52] The court used the nature v. purpose test to conclude that Argentina's actions were not an act of state but participation in the bond market in the manner of a private actor.[53]

C. Additional US law providing state immunity

Prior to enactment of the FSIA, the US Congress passed the International Organizations Immunities Act (IOIA). The statute granted international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[54] At the time the statute entered into force, the immunities extended to foreign governments by the United States were absolute. The FSIA, as described in great detail *supra*, restricted this immunity.

The United States Supreme Court has not, as yet, ruled on the scope of immunity offered to intergovernmental organizations (IGOs) under the IOIA, however, in a recent (2008) appellate case, *Inversora Murten, S.A. v. Energoprojekt-Niskograndnja Co.*, the District of Columbia Circuit Court held the immunity to still be absolute.[55] As a result, there are no exceptions for commercial activity, etc. The only available exception is achieved through the organization's own express waiver. International and national law governing immunity for international organizations requires that the language of such a waiver must not be broad on its face but narrowly construed, and must further the organization's objectives in entering the contract or agreement in which the waiver is found.[56]

Executive Order 9698 contains an extensive list of international organizations entitled to enjoy the absolute immunity of the IOIA.[57] A number of space-related organizations can be found on the list, to wit, the European Space Research Organization succeeded by the European Space Agency (ESA), the International Telecommunications Union (ITU), the International Telecommunications Satellite Organization, and the United Nations. Additionally, ICAO, the United International Bureau for the Protection of Intellectual Property and the World Intellectual Property Organization (WIPO) are listed. Great care should be taken to properly word express waivers of immunity in P3 agreements involving listed IGOs, taking into account that the organization must receive some benefit for the immunities it releases.

Several other laws in the United States deal with bringing suit against the United States in a US court. As this is very possible in light of the stated US policy to employ more entities along the public-private spectrum, they bear mention. First is the Tucker Act, in which the US government waives its immunity against suit for actions arising out of express or implied contracts with

the government, or one of its agencies.[58] Claims may be for liquidated damages, or for constitutional violations, particularly for the taking of property. Tort claims are excluded under this Act. "The Tucker Act waives sovereign immunity and allows the Court of Federal Claims to hear certain suits against the government."[59] Claims for less than $10,000 US fall under the Little Tucker Act; concurrent jurisdiction is available for these in either federal district court or the Court of Federal Claims.[60]

As space business involves considerable interdependence between the military and the private sector, falling closer to the center of the public-private continuum, litigation involving contracts between the military and private contractors can be instructive. In *Dep't of the Army v. Blue Fox, Inc.*, a government sub-contractor on a construction project sued the Army and the Small Business Administration, seeking an equitable lien on property held jointly which had been distributed to the primary contractor who had failed to pay the sub-contractor.[61] The Army had not required a Miller Act bond,[62] which requires a contractor on a federal project to post two bonds, a performance bond and a labor and material payment bond.[63] The bonds cover first-tier claimants, or primary contractors, and their sub-contractors. However, claimants further down the chain are considered too remote and cannot assert a claim. And, as Blue Fox learned, with no bond, there was no possible recovery because sovereign immunity bars liens on government property.[64]

Lastly, the Federal Tort Claims Act (FTCA) permits private parties to bring an action against the United States in a federal court for most torts committed by persons acting on behalf of the United States.[65] Exceptions to the FTCA include the *Feres* doctrine, prohibiting suit by military personnel for injuries sustained incident to service;[66] the discretionary function exception, immunizing the United States for acts or omissions involving policy decisions;[67] and the intentional tort exception, unless the offending acts were committed by federal law enforcement or investigative personnel.[68] Pertinent to discussion of immunity in the context of space-related P3s is *Smith v. United States*,[69] as it dealt with a tort claim that arose in Antarctica, a region of indeterminate status in international law. Although the FTCA contemplated extra-territorial claims, the issue was whether a sovereign-less region constituted a foreign country for the purposes of applying the FTCA. The Court held that it did not, leading to the conclusion that a plaintiff injured from an event occurring in outer space caused by the negligence of the United States would not be able to sue a government partner under the FTCA.

D. Eleventh Amendment Immunity

The Eleventh Amendment of the United States Constitution removes a class of cases from Article III jurisdiction, establishing the judiciary and the federal court system.[70] This shield was extended t o arms, or alter-egos, of the state in *State Highway Comm'n v. Utah Constr. Co.*.[71] However, despite the breadth of the amendment's reach, some state-created and/or state-managed entities are not immune. The jurisprudence that has developed analyzes a number of structural factors in order to determine an entity's immunity or vulnerability to suit. In light of the many varied entities

that have emerged in the trend away from the purely public end of the spectrum, courts have encountered difficulty in consistent application of these multi-factoral tests.

The arm-of-the-state doctrine appears in connection with three basic entities: 1) a political subdivision, like a city or county, or municipality; 2) an entity established by two or more states by congressionally-approved compact; and 3) a special purpose public corporation or agency established by or for the state.[72] The first is not entitled to Eleventh Amendment immunity; some forms of the other two are. Understanding the purpose of the immunity assists in the analysis required to determine whether an entity of the second or third type can avoid suit, and, ultimately, liability. "[I]t is not just the state's interest in its public treasury which is at stake in the assertion of Eleventh Amendment immunity. The state also has a 'dignity' interest as a sovereign in not being haled into federal court."[73]

The arm-of-the-state test generally includes a combination of five of the following eight factors: 1) whether a money judgment would be satisfied out of state funds or could be satisfied without direct participation of guarantees from the state; 2) the source of the entity's funding; 3) whether the entity performs central governmental functions or has a proprietary function; 4) whether the entity may sue or be sued and enter into contracts in its own name and right; 5) whether the entity has the power to take the property in its own name or only in the name of the state and whether the property is subject to state taxation; 6) whether the state exerts control over the agency and, if so, to what extent; 7) whether the state has immunized itself from responsibility for the agency's acts or omissions; and 8) the corporate status of the entity.[74]

These factors are considered in evaluation of the nexus between an entity and the state, to discriminate between governmental entities. Of these factors, the source of the entity's funding is considered to be the weightiest.[75] However, it is important to recognize that these factors are not intended to impute arm-of-the-state status to private entities.[76] This point was made recently by the US Court of Appeals for the Ninth Circuit, in a case where a private company claimed immunity from services it provided to the district attorney.[77] Contractors do not receive immunity.[78] The fact that a private company performs a central governmental function is not enough to grant state immunity, nor can immunity be extended to private companies as arms of the state.

While true that independent contractors cannot, per se, claim immunity from suit arising out of work done for the state, there are situations when a contractor can "acquire" immunity. This exception "provides that a contractor [that] performs its work with a governmental agency, and under the governmental agency's direct supervision, is not liable for damages resulting from its performance."[79] A contractor would not be protected for its negligence, only for acts done in accordance with its contract with the state.[80] Some states call this derivative sovereign immunity.[81]

Also important to the arm-of-the-state analysis is recognition of bi-state entities, creations of three sovereigns – two separate states and the federal government. These bodies are governed by compact agreements between the

states (or between a state and an Indian tribe), with congressional consent.[82] Typically, these Compact Clause agencies fall outside the range of Eleventh Amendment immunity as that immunity is "only available to one of the United States."[83]

Another case reveals an organizational structure resembling a P3, in the context of a taking. The analysis of whether the organization was a part of the state is useful. In *Illinois Clean Energy Community Foundation v. Filan*, the legislatively created Foundation enjoined the state from enforcing a demand for its assets on the grounds that it would be a taking.[84] The state countered with the argument that the Foundation was, in essence, the state and therefore could not complain about the state taking its own property. Additionally, the state argued that it could amend the statute creating the Foundation to allow for the transfer of title. The court quickly disposed of that argument as the state cannot lawfully enlarge its regulatory power to allow taking someone's property through amendment of an existing statute but only through enactment of a new one. More telling was the court's holding that the "fact that the state's legislature authorized the creation of the plaintiff foundation does not make the foundation a state agency.[85]

Extension of immunity requires far more than pleading it. Axiomatic, too, is the fact that parties who successfully plead immunity avoid the litigation that could result in a published opinion.

IV. APPLYING THE TESTS TO P3s

Now it is time to apply the different doctrines that allow or deny immunity to the hybrid entities that are evolving in the space industry. "[E]ach PPP is sui generis, and consequently...no body of law or regulations...applies to all PPP contractual arrangements."[86] The decision of how to apply the various immunity tests to P3s becomes more difficult the closer to the middle of the continuum one finds the entity at issue. An activity carried out by a foreign state can be denied immunity if purely commercial. On the other hand, an independent contractor following his contract to the letter can enjoy immunity.

"[T]he most important factors to consider in deciding whether a hybrid entity is the state for purposes of sovereign immunity are the extent of state control and whether the entity was acting as the state's agent in conducting the activity that gave rise to the suit."[87] US courts are "extremely hesitant to extend this fundamental and carefully limited immunity to private parties whose only relationship to the sovereign is by contract."[88] This is not necessarily a bad thing. The commercial exception in restrictive foreign state immunity was adopted primarily because it leveled the playing field in a world where governments were behaving increasingly as ordinary trade partners. At this point in history, governments actually are trade partners.

What becomes apparent, looking at the state of the law, international and national, is that immunity does not extend in the face of clear, unambiguous waiver and obvious commercial activities. A P3 in the US, coalescing private interests with a government partner, requires use of the arm-of-the-state test. How is the deal structured? What is the source of funding? Who

will have to pay a judgment – the entity or the government? Are the roles clearly defined, the risk spread equitably and transparently? Is the service provided governmental or proprietary? Already, telecommunications infrastructure has been widely recognized as a public service.[89] So, too, do earth observation, the internet, and military communication illustrate delivery of public services through private means. And, with a foreign partner, the nature v. purpose test will apply.

As noted earlier, it appears nearly impossible for a privatized concern to avoid suit under the auspices of the state, and only possible for a hybrid if the factors, considered together, render immunity inappropriate. In actions against states or their agencies/entities within the US, the inquiry is whether the entity is an arm of the state. Internationally, the inquiry will focus on 1) whether the entity is an instrumentality or organ of the state; 2) whether the P3's activity is commercial in nature, and, if so, where it occurred; and 3) was the activity from which the action arose an act of state?

The locus of the activity is significant. There is potential for a private partner with a foreign government in a P3 to be at a disadvantage in a US court. It is important to make sure that there is direct effect in the US if the P3 will be operating extraterritorially. A distant consequence, such as an adverse effect on stock price if a deal does not go through, would not qualify. Fraudulent activity in connection with a US bank account would. A claim based upon a bid, won or lost, for work to be performed outside the US does not create a direct enough effect for suit in the US.

V. RECOMMENDATIONS

P3s are based upon contractual agreement. In structuring the special purpose vehicle and drafting the joint venture agreements, care in drafting and, possibly, standardization of contracts are tools for keeping arrangements transparent. P3s are most successful when they survive long enough to realize the returns.

Six guiding principles have been identified for the sustainability of P3s in infrastructure contexts and they can easily be applied when creating space-related ventures.[90] They are: 1) design the project to deliver a balanced risk profile between the public and private partners; 2) win the commitment of critical stakeholders and operators; 3) develop a strong contract setting forth the rules of the game and clearly defining roles and responsibilities; 4) drive the bidding program allowing buy-in at all levels and stages of the process; 5) demonstrate improved service delivery; and 6) sustain change. Independent advisors have been recognized as useful in structuring P3 transactions to ensure the proper balance between public and private interests.[91] Transparency is a key issue.

Ultimately, the viability of P3s comes down to principles of equity and fair dealing, of fairness and natural justice, or due process, both substantive and procedural. The restrictive theory of immunity was adopted globally in recognition of the practical realities of business and government in the twentieth century, and in an effort to reduce legal maneuvering to avoid responsibility, even by sovereign states. These realities have solidified in the beginning of the twenty-first century.

Hence, it is safe to conclude that the restrictive theory of state immunity has achieved the status of customary international law, for it is followed by a majority of the international community.

It is important to address these realities in the early stages of a project. P3s make public services available to more users when done efficiently. The private sector has a better track record. Efficient delivery to more end-users is really an issue of freedom of access, found in Article I of the Outer Space Treaty,[92] and in customary international law – not only to space itself, but also to its benefits for all on Spaceship Earth.[93] If both sides of the spectrum proactively acknowledge the exposures and fairly apportion the risks between them, then the synergy created by P3s is an awesome resource available to all.

Clearly, the framers of the early space treaties contemplated space activities for both the public and private sectors.[94] It is a natural development that these activities have evolved to include formalized cooperation, not just between states, but between states and private entities. However, even with the lofty principles of the treaties to guide space actors, and fairness a cornerstone of the legal relationships that evolve, it is wise to address another reality – namely, that not all participants will play fair. For this reason, it is recommended t hat the claims arising from space-related P3s be resolved on the basis of private law, where decisions are binding and relief and enforcement possible. Government immunity does not have to upset the balance between partners in a P3. All that is required is clarity, transparency, and good planning.

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[32] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).
[33] *Mission of India*, 127 S.Ct. at 2355.
[34] *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 991 (10th Cir. 2007) (citations omitted).
[35] 538 U.S. 468, 473 (2003) (affirming the Ninth Circuit holding that *Dole Foods* did not meet the definition of an instrumentality of a foreign state when the facts were applied to the five factors described herein. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001).
[36] *Board of Regents of the University of Texas System v. Nippon Telephone and Telegraph Corp.*, 478 F.3d 274, 279 (2007) (holding that regulation was not supervision, nor was research a government function or an exclusive obligation or right such that Japan's largest telecommunications company was immune from suit in a U.S. patent action as an instrumentality of the state); *see also Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co.*, 476 F.3d 140 (2d Cir. 2007); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004).
[37] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic Systems, Inc.*, 495 F.3d 1024, 1034 (9th Cir. 2007).
[38] *Ibid.*
[39] *Dole*, 538 U.S. at 478; *Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 349 (7th Cir. 2007).
[40] *Leith v. Lufthansa German Airlines*, 897 F.Supp. 1115 (N.D. Ill 1995) (a US federal trial court decision).
[41] *Dole*, 538 U.S. at 474, 477.
[42] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006).
[43] 28 U.S.C. 1608(e); *Cubic Defense*, 495 F.3d at 1028.
[44] *Weltover*, 504 U.S. at 611.
[45] 507 U.S. 349, 356 – 57 (1993).
[46] 28 U.S.C. 1605(a)(2).
[47] 504 U.S. at 618.
[48] 501 F.3d 534 (6th Cir. 2007).
[49] *Ibid.* at 540.
[50] *World Wide Minerals Ltd. v. Republic of Kazakhstan,* 296 F.3d 1154, 1164 -- 65 (2nd Cir. 2002) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).
[51] *Weltover*, 504 U.S. at 613 – 14.
[52] *Ibid.* at 615.
[53] *Ibid.* at 616.
[54] 22 U.S.C. 288a(b).
[55] 2008 WL 441836 (D.C. Cir. February 14, 2008) at *2.
[56] *Ibid.* at *1.
[57] Executive Order 9698 of February 19, 1946, 11 F.R. 1809, [EO 9698 amended by EO 10083 of Oct. 10, 1949, 14 FR 6161, 3 CFR, 1949-1953 Comp., p. 284; EO 10533 of June 3, 1954, 19 FR 3289, 3 CFR, 1954-1958 Compl, p. 194].
[58] 28 U.S.C. 1491.
[59] *L-3 Communications Integrated Systems, L.P. v. United States*, 79 Fed. Cl. 453, 460 (2007). Interestingly, the Principal Deputy Secretary of the Air Force whose conviction for violating conflict of interest laws led to the suit against the United States was responsible for the largest P3 in US Air Force history, worth 10.1 billion USD.
[60] 28 U.S.C. 1346(a)(2).
[61] 525 U.S. 255, 256 (1999).

[62] 40 U.S.C. 3131 *et seq.*
[63] "The Miller Act: online: <http://www.sio.org/html/miller.html> (date accessed 17 April 2008).
[64] *Blue Fox*, 525 U.S. at 259 – 60.
[65] 28 U.S.C. 1346(b); 28 U.S.C. 2671 – 2680.
[66] *Feres v. United States*, 340 U.S. 135 (1950).
[67] 28 U.S.C. 2680(a).
[68] 28 U.S.C. 2680(h).
[69] 507 U.S. 197 (1993).
[70] U.S. CONST. Article III.
[71] 278 U.S. 194, 199 (1929).
[72] *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56,61 (2003).
[73] *Ibid.* at 63.
[74] *Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004); *Fresenius*, 322 F.3d at 62.
[75] *Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004).
[76] *Del Campo v. Kennedy*, 517 F.3d 1070, 1077 (9th Cir. 2008).
[77] *Ibid.*
[78] Of note, the government contractor defense to the FTCA is a different thing entirely. There, a contractor of the federal government can claim immunity from torts committed if the contractor was following specifications given by the government, similar to the acquired immunity doctrine.
[79] *Lopez v. Mendez*, 432F..3d 829, 833 (8th Cir. 2005).
[80] *Ibid.*
[81] *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007); *GLF Construction Corp. v. LAN/STV*, 414 F.3d 553 (5th Cir. 2005); *Butters v. Vance Intern., Inc.*, 225 F.3d 462 (4th Cir. 2000); *Hilbert v. Aeroquip, Inc.*, 486 F.Supp. 2d 135 (D. Mass. 2007); *Taylor v. Comsat Corp.*, Slip Copy, 2006 WL 3246508 (S.D. W. Va. 2006).
[82] "Interstate Compacts as a Means of Settling Disputes between States: (Jan. 1922) 35 Harvard L. Rev. 3, 322 – 26.
[83] *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 43 (1994).
[84] 392 F. 3d 934, 935 (7th Cir. 2004).
[85] *Ibid.* at 936.
[86] Cook, *supra* note 7 at 1.
[87] *Takle v. University of Wisconsin Hosp. and Clinic Auth.*, 402 F.3d 768, 772 (7th Cir. 2005) (citing *Thiel v.State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996)).
[88] *Del Campo*, 517 F.3d at 1076.
[89] J.P.Singh, *Leapfrogging Development: The Political Economy of Telecommunications Restructuring* (Net Library 1999) at 19.
[90] Cledan Mandri-Perott, "Six Guiding Principles to Achieve Sustainable PPP Arrangements", online: www.ip3.org http://www.ip3.org/pub/2005_publication_002.htm (date accessed 18 April 2008).
[91] Jagun, *supra* note 5.
[92] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205.
[93] Buckminster Fuller, *Operating Manual for Spaceship Earth*, (New York: E.P.Dutton & Co., 1963) section 8.
[94] *Outer Space Treaty*, *supra* note 92 at Art. VI.