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The Case of the Little Yellow Cuban Biplane: Can Interest Analysis Reconcile Conflicting Provisions in Federal Statutes and International Treaties?

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THE CASE OF THE LITTLE YELLOW CUBAN BIPLANE: CAN INTEREST ANALYSIS RECONCILE CONFLICTING PROVISIONS IN FEDERAL STATUTES AND INTERNATIONAL TREATIES?

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"This little yellow Cuban biplane opened a diplomatic Pandora's box when it touched down at the Key West airport."[1]

I. INTRODUCTION

In November 2002, an Antonov Colt biplane[2] owned by the Cuban government was stolen from a Havana airfield and flown to Key West, Florida, in a daring attempt by eight Cuban citizens to gain political asylum.[3] The incident was not the first of its kind; in recent years, Cuban defectors increasingly have taken to the skies[4] in their ninety-mile journey to reach American soil[5] in the Florida Keys.[6] In addition to many affable

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1. *CNN Newsnight* (CNN television broadcast, Apr. 25, 2003), transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0304/25/asb.01.html.

2. The aircraft is a Russian-made Antonov An-2. The model was built between the 1940s and 1960s and is regarded internationally as an antiquated but nonetheless dependable utility aircraft. *See* WARBIRD ALLEY, ANTONOV AN-2 "COLT", *at* http://www.warbirdalley.com/an2.htm (last visited Oct. 31, 2004). "With the collapse of the communist regime . . . a small number of An-2s have begun to appear on the civilian rosters in Europe and the United States." *Id.* Enthusiasts surmise that internationally, only about two thousand models are currently in airworthy condition. *Id.* These rare vestiges of a fading era can be sold for thirty to forty thousand dollars. Jennifer Babson, *Cuban Spy's Ex-Wife Buys Controversial Plane at Auction*, MIAMI HERALD, Jan. 14, 2003, at 1B.

3. Nemencio Carlos Alsonse Guerra, a 48-year old aircraft pilot employed by the Cuban government, concocted the November 1, 2002 escape. Vanessa Bauza et al., *Cuban Pilot, Family Flee to U.S.: Communist Party Member Was Unlikely Defector, Relatives Say*, S. FLA. SUN-SENTINEL, Nov. 12, 2002, at 1A. That morning, Guerra reported to work at La Cubana air strip, where he was expected to perform regular maintenance on the biplane—a single-engine aircraft regularly flown by Guerra to dust neighboring crops. *Id.* Seven other Cuban citizens met Guerra at the airstrip, and they took off for the United States. *Id.*

4. According to one journalist, there was "a long line" of unannounced air arrivals carrying Cuban defectors between 1987 and the biplane incident in 2002. *Id.*

5. The 1966 Cuban Adjustment Act's "Wet feet, Dry feet" policy provides that Cubans who reach United States shores are generally permitted to stay, while those caught in transit are usually taken back to Cuba. *See* Roland Estevez, Note, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1290 (2002).

6. A large concrete buoy on a pier in Key West, Florida, marks the southernmost point in the continental United States. The marker, which is a popular tourist attraction, features a sign that announces "90 Miles to Cuba." *See* ROADSIDEAMERICA.COM, SOUTHERNMOST POINT IN THE US, *at* http://www.roadsideamerica.com/attract/FLKEYsouthernmost.html (last visited Oct. 31, 2004).

but unexpected arrivals, blatantly aggressive incidents of air piracy by Cuban defectors have become far more common.[7]

Although the biplane's arrival may not have been extraordinary, a fiery controversy quickly erupted. The debate focused on the ultimate disposition of the mustard-yellow biplane with peeling paint and fading Cuban insignia. International law seemed to provide a clear instruction. According to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft[8] (Hague Convention), a treaty signed by Cuba and the United States,[9] participating nations are required to deliver unlawfully seized aircraft "to the persons lawfully entitled to possession."[10] The United States always has followed this mandate and returned aircraft to Cuba.[11] However, in the case of the biplane, international law did not provide the prevailing principle. A seemingly unrelated action brought in a Miami court by a Cuban-American woman, Ana Margarita Martinez, significantly altered the legal framework and ultimately led to a disposition that many considered a flagrant disregard of international law.[12]

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7. These incidents have become quite frequent:

> Between 1961 and 1989, more than one hundred American passenger planes were hijacked and diverted to Cuba. During this period, Cuban and United States authorities developed routine procedures designed to deal with the hijackings with minimal inconvenience to all parties. Ordinarily, U.S. authorities notify the Havana control tower that an American airplane has been hijacked, and that its probable destination is the José Martí airport in Cuba. Upon the aircraft's arrival, the hijacker typically surrenders to Cuban authorities and is arrested.

Mark W. Levine, Note, *Cuban Hijackers and the United States: The Need for a Modified* Aut Dedere Aut Judicare *Rule*, 32 COLUM. J. TRANSNAT'L L. 133, 143 (1994) (footnote omitted). Describing hijackings in the 1980s, a journalist explained: "Cuban authorities allowed the planes to be flown back to the United States within hours in most cases, after the hijacker or hijackers were removed and passengers were often allowed to stock up on rum and cigars." Jennifer Babson, *Seized Cuban Planes Propel Diplomacy Debate*, MIAMI HERALD, Apr. 21, 2003, at 1A."The unscheduled stops had become such a headache that in July 1983, the Federal Aviation Administration announced plans to begin a radio-television campaign stressing that hijackers would face tough treatment in Cuba." *Id.*

8. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention]. For the United States' implementing legislation, see 49 U.S.C. § 46502 (2000).

9. *See Convention for the Suppression of Unlawful Seizure of Aircraft Signed at the Hague on 16 December 1970, at* http://www.icao.int/icao/en/leb/hague.htm (last visited Aug. 31, 2004).

10. Hague Convention, *supra* note 8, at art. 9, para. 2.

11. *CNN Wolf Blitzer Reports* (CNN television broadcast, Dec. 16, 2002), transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0212/16/wbr.00.html; *see also supra* note 7 (describing the pattern of informal treatment of these incidents by both the United States and Cuban governments).

12. Professor Berta Hernandez-Truyol summarized many of the concerns: "'I think it's

In 2001, Martinez sued the Cuban government for civil damages stemming from sexual battery committed by her husband.[13] Martinez brought the lawsuit when she discovered that her husband, Juan Pablo Roque, was a Cuban spy who married her only to gain access to the Miami exile community.[14] Martinez argued that since her husband never informed her of his actual identity, he procured her consent to a marital relationship fraudulently.[15] Therefore, any intimate acts that occurred within that marriage constituted rape.[16] The jury found in her favor and awarded her a judgment of $27.1 million against the Cuban government.[17]

While Martinez's marriage to Roque was regrettably ill-fated, her ability to seek a legal remedy for these wrongs resulted from an almost

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dangerous, I think it's inappropriate, I don't think we should do it' . . . 'The government would not allow one individual to take over its foreign policy.'" Babson, *supra* note 7.

13. *See CNN Newsnight*, *supra* note 1.

14. *Id.* The two met in 1992 at a church gathering in Miami; Roque claimed he was a "high-ranking Cuban military defector." *Id.*; *see also CNN Newsnight*, *supra* note 1. Catherine Mitchell, the reporter, explained, "Roque courted [Martinez] persistently for three years and married her in 1995, on, of all days, April Fools' Day." *Id.* The marriage was integral to Roque's spy mission because, as Martinez stated, "We gave him the appearance that he was here to stay, that he was a family man." *Id.* (quoting Martinez). Martinez discovered that her husband was a spy when he mysteriously left the United States and reappeared in Havana after the Cuban military shot down a pair of civilian aircraft. *Cuban Plane Seized to Satisfy Judgment*, ST. PETERSBURG TIMES (Florida), Dec. 5, 2002, at 5B. The planes were used by Brothers to the Rescue on a peaceful mission to locate and assist Cuban refugees in the Florida Straits. *Id.* Roque "even became a pilot for Brothers to the Rescue, an anti-communist group. But a year after the wedding, Roque abruptly returned to Havana and denounced Brothers to the Rescue on television." *CNN Wolf Blitzer Reports*, *supra* note 11. In the wake of the shooting, FBI agents descended on Martinez's home. *CNN Newsnight*, *supra* note 1. Martinez explained her startling discovery: "[S]uddenly, . . . I was told by one of the reporters that was outside . . . 'Turn on CNN.' And when I [did] that, I [saw Roque] walking down from an . . . airplane in Havana." *Id.* (quoting Martinez). As Martinez watched, "Roque announced on television that he was a Cuban spy and denounced Brothers to the Rescue as a terrorist organization." *Id.* (quoting Catherine Mitchell).

15. *60 Minutes* (CBS television broadcast, Jan. 13, 2002), *available at* LEXIS, CBS News Transcripts. Martinez sued the Cuban government for the intentional tort of rape, arguing that the government was liable because Roque was merely acting as an agent. *Id.*

16. *Id.*

17. Babson, *supra* note 7. The Cuban government never arrived to defend itself in court. As one author notes, this is not unusual in cases filed under modern exceptions to foreign sovereign immunity. *Terrorist-State Litigation in 2002-03*, 97 AM. J. INT'L L. 966, 966 (2003) (citing *Peterson v. Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), as but one example of this phenomenon); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 459 (1987) (authorizing default judgments in such cases: "[a] judgment of default may be rendered against a foreign state if, after having been duly served . . . the state fails to make a timely answer or other responsive pleading to the complaint, fails to appear at trial, or otherwise fails to defend the action in accordance with applicable procedure"); Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 537 (2003) (citing *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), as another case in which the defendant nation did not appear in court).

celestial alignment of recent laws and political determinations.[18] Although the Foreign Sovereign Immunities Act of 1976[19] (FSIA) bars most private lawsuits by American citizens against foreign governments, more recent enactments enabled Martinez to bring suit.[20] The Antiterrorism and Effective Death Penalty Act of 1996[21] (AEDPA) amended the FSIA to allow private actions against foreign governments if the plaintiff alleges an injury caused by an act of terrorism by an officially designated terrorist state.[22] Only weeks after the biplane touched ground on the Key West tarmac, Congress passed the Terrorism Risk Insurance Act of 2002[23] (TRIA).[24] This Act buttressed Martinez's lawsuit by permitting her to enforce her judgment against a much wider range of assets.[25] Pursuant to this statute, the judge presiding over Martinez's case issued an order to seize and auction the biplane as an item of property belonging to the defendant Cuban government.[26]

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18. For a thorough discussion of the legal developments that enabled Martinez to sue the Cuban government and enforce her judgment by attaching the biplane to her lawsuit, see *infra* Part III.

19. 28 U.S.C. §§ 1602-1611 (2000). Under the Foreign Sovereign Immunities Act (FSIA), foreign states are generally immune from lawsuits unless the suit arises from:

> a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

20. As discussed in Part III of this Note, the Antiterrorism and Effective Death Penalty Act permitted Martinez to bring suit, and the Terrorism Risk Insurance Act enabled her to enforce her judgment against a broader range of property.

21. 28 U.S.C. §§ 1605, 1610 (2000). For a discussion of the AEDPA's impact on the FSIA, see Monroe Leigh, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AM. J. INT'L L. 187-88 (2003).

22. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 1605, 1610; Leigh, *supra* note 21, at 188.

23. Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified in various sections of 15 U.S.C.).

24. The biplane landed at Key West on November 1, 2002. Bauza et al., *supra* note 3. The TRIA was signed into law on November 26, 2002. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322.

25. The TRIA amended the FSIA by entitling individuals with judgments against a designated terrorist state to claim assets "of any agency or instrumentality of that terrorist party." Terrorism Risk Insurance Act of 2002 § 201; Joseph G. Jarret, *The Business of Terrorism: The Terrorism Risk Insurance Act of 2002*, 77 FLA. BAR J. 63, 64 (2003). In 1996, the United States included Cuba on an official list of seven state sponsors of terrorism. *See* Office of Foreign Assets Control, Department of the Treasury, 31 C.F.R. § 596.201 (2004) (listing as State sponsors of terrorism Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan).

26. Martinez's $27.1 million judgment is expected to be fulfilled gradually, primarily through

The Cuban government argued that these domestic laws should not modify prior promises made by the United States.[27] Citing the Hague Convention,[28] the Cuban government labeled the attachment of the biplane to Martinez's lawsuit "a flagrant violation"[29] of the law and demanded that the United States return the aircraft and the eight Cuban defectors.[30] The United States government declined to intervene,[31] and the biplane was auctioned in January 2003.[32]

If we think of this case as a classic debate over ownership and possession, then the auction undoubtedly resolved the matter.[33] However, if we reflect on the entire occurrence as a political problem with likely international ramifications, then the impact of this "little yellow Cuban biplane"[34] remains a complex and open-ended question. Most importantly, the incident may have set the dangerous precedent that an individual can, at the trial court level, vastly disrupt foreign relations by dissolving a foreign government's ownership interest in property that normally would be protected by international agreements.[35] One United States government official explained the potential impact of this so-called "plaintiff's diplomacy" thus: "'[I]f some American Airlines plane on the way from Puerto Rico ended up in Havana, we'd expect the Cubans to give us our airplane back' . . . ."[36] Worldwide, the aviation industry and its civilian

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seizure of frozen assets in American banks. *CNN Wolf Blitzer Reports*, *supra* note 11.

27. As CNN's Mark Potter explained, "The president of Cuba's National Assembly call[ed] the seizure of this aircraft a flagrant violation of the letter and spirit of migratory agreements between Cuba and the United States." *Id.*

28. *See supra* note 8.

29. *CNN Wolf Blitzer Reports*, *supra* note 11.

30. *CNN Newsnight*, *supra* note 1.

31. The Immigration and Naturalization Services (INS) probably released the defectors to their families in the United States and declined to bring criminal charges against the pilot; government officials also refused to take any action or make any official statements regarding the proper disposition of the biplane. Bauza et al., *supra* note 3. In response to this decision, Cuban "President Fidel Castro led, a rally outside the American mission in Havana." *Cuba: Thousands Protest Against U.S.*, N.Y. TIMES, Nov. 20, 2002, at A6.

32. When few bidders turned out for the sale, Martinez chose to buy the plane for seven thousand dollars with hopes of reselling it for a higher price. *See* Babson, *supra* note 2.

33. The auction would have passed bona fide title to the purchaser, thereby finalizing disposition of the biplane.

34. *See supra* note 1 and accompanying text.

35. *See* Babson, *supra* note 7. Courts and commentators have argued that plaintiffs should not be able to impact foreign relations so profoundly. *See, e.g.*, Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102. *But see* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 15 (D.D.C. 1998) (asserting that private causes of action against state sponsors of terrorism are just one more means by which America can effectively combat terrorism).

36. Babson, *supra* note 7. Rick Asper, a Florida aviation attorney, explained, "'Our interests are substantially higher—the aircraft at risk from hijacking from the U.S. to Cuba are not Antonovs

passengers depend on participating nations to honor international agreements.[37] Yet domestically, the United States has an interest in compensating victims of terrorism and deterring future violence by allowing plaintiffs to enforce judgments against foreign nations. The biplane, as an item of property belonging to the Cuban government and resting on American soil, provided an opportunity to compensate Martinez. Thus, the case presents a unique opportunity to investigate the intersection of two bodies of law that each grapple with international terrorism. While the fate of the biplane already has been determined, the case is worth revisiting because of the likelihood that the same controversy will arise the next time an aircraft owned by an officially designated state sponsor of terrorism is unlawfully seized and brought to the United States.[38] Throughout this Note, I discuss the "case of the biplane"; by this nomenclature I refer to a past incident as well as to all future cases in which the same statute and treaty conflict.[39]

Part II of this Note analyzes the three international agreements that define and protect foreign ownership interests in civil aircraft, with special focus on their cumulative force in defining the applicable language of the Hague Convention. Part III focuses on the evolution of domestic laws that allow Americans to bring suit against state sponsors of terrorism. In anticipation of the interest analysis provided in subsequent sections, Parts II and III provide detailed legislative histories of the conflicting laws, including relevant predecessor laws. Part IV considers whether traditional canons of construction can resolve the apparent conflict and finds that

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that are worth $40,000. We are talking about Boeings.'" *Id.*

37. *See generally* Shadrach A. Stanleigh, Note, *"Excess Baggage" at the F.A.A.: Analyzing the Tension Between "Open Skies" and Safety Policing in U.S. International Civil Aviation Policy*, 23 BROOK. J. INT'L L. 965 (1998) (discussing the "open skies" doctrine as a civil aviation industry development, mostly prompted by American airline corporations, and tracing its origins in international agreements).

38. In fact, two other aircraft landed in the Florida Keys after the biplane and also were auctioned to fulfill Martinez's judgment against Cuba. *Two Hijacked Cuban Planes To Be Auctioned in Florida*, AGENCE FRANCE PRESSE, May 29, 2003 ("The aging DC-3 and Antonov An-24 planes were hijacked to Key West, Florida on March 19 and April 1. Both carried about 30 passengers on a domestic Cuban route when they were hijacked."). The two aircraft sold significantly below market value: the Antonov An-24 sold for $6500, while the DC-3 sold for $12,500. *See Cuban Aircraft, Cheap*, N.Y. TIMES, Jun. 3, 2003, at A29. Demonstrating the significant difference between sales price and fair market value, the purchaser of the An-24 immediately listed the aircraft for sale on eBay and drew a selling price of almost $60,000. *Aircraft Sold on eBay for USD59,100*, AIRLINE INDUSTRY INFO., July 14, 2003 ("The eBay auction lasted for a ten-day period and received 96 bids before it ended.").

39. Most likely, these future aircraft would be from Cuba. However, the same questions would arise in the case of an aircraft from any nation identified as a state sponsor of terrorism, since the TRIA also would apply to all property that belongs to those nations and arrives on American soil. *See supra* note 23.

these strict rules do not provide a consistent answer. Part V introduces interest analysis, an approach used in interstate conflicts[40] jurisprudence. Part V also considers the legislative interests behind the competing laws, finding that the comparative impairment approach may be the most appropriate for resolving intrajurisdictional conflicts between statutes and treaties. This Note concludes with a broad recommendation that courts apply interest analysis to resolve intrajurisdictional conflict of laws questions, rather than perform concealed interest analyses under the guise of mechanical application of selected canons. Additionally, this Note recommends that in the case of the biplane, lawmakers should create an exception for civil aircraft that is similar to the immunity currently afforded to diplomatic and consular property.[41] This change is essential because canons of construction cannot produce a predictable outcome. A decisive answer, however, is necessary in this conflicts question; both the continued protection of the civil aviation industry and the steadfast deterrence of air piracy depend on consistent application of international agreements. With humanity still reeling from the tragic events of September 11, 2001,[42] it is perhaps more important than ever to preserve the same set of international agreements that helped a shocked world regain confidence in civil aviation in the aftermath of World War II.[43]

II. MULTILATERAL TREATIES THAT DEFINE AND PROTECT FOREIGN OWNERSHIP INTERESTS IN AIRCRAFT

In the years following World War II, lingering tensions among nations had to be reconciled with a dramatic increase in the use of aircraft for non-military purposes.[44] Although political hostilities may entice nations to

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40. Conflict of laws is the body of law that concerns those cases in which "[e]vents and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

41. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 466 (1987) (summarizing the major tenets of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations as follows: "[t]he premises, archives, documents, and communications of an accredited diplomatic mission or consular post are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use").

42. For discussion of the impact of September 11 on the civil aviation industry, see Laurence Zuckerman, *A Day of Terror: The Airlines: For the First Time, the Nation's Entire Airspace Is Shut Down*, N.Y. TIMES, Sept. 12, 2001, at A19 (explaining that the decision immediately to shut down all American airspace to commercial aircraft was without precedent).

43. *See infra* Part II (discussing the emergence of multilateral treaties governing civil aviation in the years following World War II).

44. *See* Angela Edwards, Note & Comment, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?*, 9 EMORY INT'L L. REV. 595, 598 (1995) (noting that the Chicago Convention,

detain, seize, or take hostile actions against foreign aircraft, an emerging civil aviation industry of an "inherent[ly] international character"[45] relies upon friendly cooperation between otherwise apprehensive regimes.[46] In addition, airplanes are imperfect machines that can be steered off course by weather, mechanical problems, or intentional and unintentional acts of humans,[47] so that any nation's aircraft can be forced to land in unfriendly territory. Mindful of these realities, the global community sought to establish a body of international law to protect civil aircraft.[48]

A. *The Chicago Convention of 1944*

The Convention on International Civil Aviation[49] was the world's first attempt to create special rules for civil aircraft.[50] The agreement, dubbed the Chicago Convention,[51] was intended to protect the aviation industry, as well as each nation's geopolitical and security interests.[52] So that nations could provide more flexible access for civil aircraft without compromising domestic security, the Chicago Convention mandated a uniform system of aircraft registration and regulation.[53] Additionally, the

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which attempted to develop international air diplomacy, was a response to the post-World War II rise in civil aviation).

45. Terena Penteado Rodrigues, *International Regulation of Interests in Aircraft: The Brazilian Reality and the UNIDROIT Proposal*, 65 J. AIR L. & COM. 279, 281 (2000).

46. *See* Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 661 (2003) (explaining that the two World Wars were a major "catalyst" for international aviation treaties).

47. For a thorough discussion of various misfortunes that can occur mid-flight and their legal implications, see generally Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. U. INT'L L. REV. 891 (2001).

48. *See* Dempsey, *supra* note 46.

49. Convention on Int'l Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

50. The Chicago Convention is applicable only to civil aircraft, "and shall not be applicable to state aircraft." *Id.* at art. 3(a). "Aircraft used in military, customs, and police services shall be deemed to be state aircraft." *Id.* at art. 3(b).

51. The agreement's nomenclature reflects its history; it was developed and ratified at a meeting in Chicago. *See id.*, Signature of Convention.

52. The preamble explains, "the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security." *Id.*, Preamble. Although participating nations wished to preserve the doctrine of exclusive sovereign control of airspace, they also recognized that an evolving international civil aviation industry would necessitate broader rights of entry for non-military aircraft. *See, e.g.*, *id.* at art. 25. The doctrine of state control over airspace was recognized and codified by the international community at the 1919 Paris Conference, held after the First World War. Ved P. Nanda, *Substantial Ownership and Control of International Airlines in the United States*, 50 AM. J. COMP. L. 357, 358 (2002) (discussing the Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173).

53. The Chicago Convention established the International Civil Aviation Organization

Chicago Convention sought to protect foreign ownership and security interests in aircraft. The agreement provides that "[a]n aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."[54] Transfers must comply with the rules of the nation in which the aircraft was previously registered.[55] These provisions serve to deter governments from seizing foreign aircraft because unregistered aircraft are not considered airworthy under the laws of any signatory nation.[56]

B. *The Convention on the International Recognition of Rights in Aircraft of 1948*

In 1948, delegates to the Convention on the International Recognition of Rights in Aircraft[57] established and signed the Geneva Convention.[58] The agreement strengthened the Chicago Convention's mandates by reaffirming participating nations' dedication to the protection of ownership rights in aircraft[59] and by avowing the supremacy of these international mandates.[60] Article I provides that "[n]othing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit or recognise any right as taking priority over the" property rights, security interests, or rights acquired by contract or lease in the aircraft's nation of origin.[61] The Geneva Convention also strengthened the registration provisions of the Chicago Convention by prohibiting transfer of ownership from one nation

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(ICAO), which "is given responsibility for regulating the many technical aspects of international civil aviation. . . . [T]he jurisdiction of the ICAO includes such matters as aircraft licensing, airworthiness certification, registration of aircraft, international operating standards, and airways and communications controls." Dempsey, *supra* note 46, at 661-62.

54. Chicago Convention, *supra* note 49, at art. 18.

55. *Id.* at art. 19.

56. *Id.* at art. 31.

57. Convention for the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T. 1830, 310 U.N.T.S. 151 [hereinafter Geneva Convention].

58. The treaty is abbreviated this way because the agreement was signed at Geneva. *See id.*

59. *See id.* The overall intent of the parties to the Geneva Convention is succinctly expressed in the second "whereas" clause: "WHEREAS it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognised internationally . . . ." *Id.*

60. *See infra* text accompanying note 61.

61. Geneva Convention, *supra* note 57, at art. I. Lorne Clark and Jeffrey Wool provide a useful example of the Geneva Convention in operation: "State X agrees to recognize proprietary rights in aircraft created in State Y, the State where the aircraft in [sic] registered for nationality purposes under the Chicago Convention." Lorne Clark & Jeffrey Wool, *Entry into Force of Transactional Private Law Treaties Affecting Aviation: Case Study—Proposed UNIDROIT/ICAO Convention as Applied to Aircraft Equipment*, 66 J. AIR L. & COM. 1403, 1412 n.32 (2001).

to another "unless all holders of recorded rights have been satisfied or consent to the transfer."[62]

C. *The Hague Convention on the Suppression of Unlawful Seizure of Aircraft of 1970*

While the preceding agreements focused on broad issues of ownership in aircraft, the Hague Convention was a significantly more targeted accord—participating nations primarily sought to reduce incidents of air piracy.[63] Specifically, the drafters were concerned that unlawful seizures of aircraft threatened the civil aviation industry and posed a serious risk to liberty and property interests within member states.[64]

Although the agreement does not focus on aircraft ownership per se, it contains important provisions that strengthen the goals articulated in the Chicago and Geneva Conventions. Article IX mandates that "[Contracting States] shall without delay return the [unlawfully seized] aircraft and its cargo to the persons lawfully entitled to possession."[65] This provision is consistent with the international community's twice-articulated desire to protect foreign ownership interests in aircraft unexpectedly brought under another nation's jurisdiction.[66] Therefore, when interpreted in light of the preceding two treaties, the Hague Convention sets out a clear course of conduct for the United States government: a Cuban aircraft that is unlawfully seized and brought to the United States in an act of air piracy should be returned at once to its original owner in Cuba, even if the owner is the Cuban government. However, when considered separately, the phrase "lawful owner" also can describe a person entitled to ownership of the aircraft under international *or* domestic law.[67] Indeed, this was Martinez's argument, and it ultimately won her title to the aircraft based

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62. Geneva Convention, *supra* note 57, at art. IX.

63. *See* Hague Convention, *supra* note 8. The Preamble begins with the following clauses: "Considering that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation," and "[c]onsidering that the occurrence of such acts is a matter of grave concern . . . ." *Id.*

64. *See id.* Much of the Hague Convention concentrates on the handling of hijacking suspects. *See id.* at arts. 6-8. In fact, the treaty is most often cited for the establishment of a model international extradition process. *See* Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT'L & COMP. L. REV. 493, 509-13 (2003).

65. Hague Convention, *supra* note 8, at art. 9, para. 2.

66. These goals already had been expressed in the Chicago and Geneva Conventions. *See supra* Parts II.A-B.

67. Hague Convention, *supra* note 8, at art. 9, para. 2.

on a complex weave of domestic laws that defined her right to sue and enforce her judgment against the nation of Cuba.[68]

III. DOMESTIC LAWS THAT ALLOW AMERICANS TO BRING AND ENFORCE LAWSUITS AGAINST FOREIGN NATIONS

While the international agreements discussed above typically would govern questions of foreign ownership interests in aircraft, the case of the biplane becomes more complicated once domestic laws factor into the analysis. As noted above, the aircraft was not simply foreign-owned; a sovereign government, the nation of Cuba, was the registered title-holder. Adding to the complexity is the fact that the Cuban government occupies a special status under American law as a federally designated state supporter of terrorism.[69] As the following discussion reveals, this label fundamentally alters the analysis and places the biplane in a rather unique choice-of-law quandary.

A. *Foreign Sovereign Immunities Act of 1976*

Martinez asserted rights vested by fairly recently enacted laws, but the concept behind those laws is not new.[70] The laws upon which Martinez's suit was based are the culmination of a long history of congressional attempts to expand plaintiffs' abilities to bring suits and enforce judgment awards against foreign governments. In order to establish a more thorough context for the recent enactments in this area, some attention must be given to earlier developments. This inquiry begins with the FSIA.[71]

Traditionally, foreign governments enjoyed absolute immunity from the jurisdiction of another nation's courts.[72] The modern global marketplace began to challenge this traditional rule, as governments increasingly contracted with foreign corporations and individuals.[73]

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68. *See infra* Part III.

69. *See supra* note 23.

70. Martinez's claim was pursuant to the AEDPA, *see infra* Part III.B, and the TRIA, *see infra* Part III.E.

71. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2000).

72. *See Foreign Terrorism and U.S. Courts: Hearings on S. 825, the Foreign Sovereign Immunity Act, Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 57 (1994) (testimony of Jamison S. Borek, Deputy Legal Advisor, U.S. Department of State).

73. One court explained the evolution of the modern theory of sovereign immunity as a direct result of "the rise of Communism and the consequent outgrowth of state trading and shipping companies. . . . [T]he United States began to recognize the restrictive theory of foreign sovereign immunity, which permitted suits arising from a foreign state's commercial activities." Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 11 (D.D.C. 1998) (citing S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); W. Friedmann, *Changing*

Impenetrable foreign sovereign immunity disadvantaged private parties to such contracts because it removed the opportunity to seek a judicial remedy against a contracting nation in the event of a breach.[74] States began carving out exceptions to the doctrine, particularly in the area of commercial transactions.[75] The United States codified this emerging "restrictive theory" of sovereign immunity in the 1976 FSIA.[76] Under this revised doctrine, neither a state nor its agent is immune from the jurisdiction of other nations' courts when the lawsuit involves claims that could be brought against a private party.[77] As the following discussion reveals, while the FSIA remains the default rule for lawsuits brought by American persons against foreign governments, modern changes have further restricted foreign sovereign immunity.

Social Arrangements in State-Trading States and Their Effect on International Law, 24 LAW & CONTEMP. PROBS. 350 (1959)).

74. *See* Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(A)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1124, 1127 (1993) (explaining the history of, and rationale for, the commercial activities exception).

75. Boxer v. Gottlieb, 652 F. Supp. 1056, 1060 (S.D.N.Y. 1987). The United States government formally accepted a "restrictive theory" of foreign sovereign immunity on May 19, 1952, when it published the "Tate Letter." *See* Letter from Jack B. Tate, Acting Legal Advisor, to Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, app. 2 at 711 (1976).

76. *See* 28 U.S.C. §§ 1602, 1605 (2000). A court lacks jurisdiction over any case that does not come within one of the enumerated exceptions to foreign sovereign immunity set forth in the FSIA. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) ("Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state."); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (finding that the FSIA was "the sole basis for obtaining jurisdiction over a foreign state" in American courts). As the FSIA's legislative history reveals, the law was intended to be the exclusive source of law for foreign sovereign immunity determinations. *Flatow*, 999 F. Supp. at 11 ("In 1976, in order to promote uniform and apolitical determinations, Congress transferred immunity determinations from the Department of State to the judiciary and otherwise essentially codified the . . . restrictive theory of foreign sovereign immunity in the FSIA.") (citing the legislative history contained in H.R. REP. NO. 94-1487 (1976)).

77. *Boxer*, 652 F. Supp. at 1060. Conduct that cannot be classified as commercial or tortious was deemed purely governmental under the FSIA and continued to enjoy the benefit of sovereign immunity. *See, e.g.*, Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 165 (D.C. Cir. 1994) (finding that a government does not come under the jurisdiction of the federal court when a governmental agent kidnaps an American citizen since the act of kidnapping is not commercial or tortious conduct as per the FSIA's exceptions to sovereign immunity). When sovereign immunity applies, immunity is not merely an affirmative defense to be declared during proceedings. Instead, it is an absolute bar to litigation and the foreign government need not even respond to initial pleadings. Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 39 (D.C. Cir. 2000).

B. *Antiterrorism and Effective Death Penalty Act of 1996*

Congress passed the AEDPA[78] in response to tragic terrorist attacks on American soil in the early 1990s.[79] The AEDPA marked a significant narrowing of foreign sovereign immunity[80] because it broadened the tort liability exposure of certain foreign governments and created new avenues of compensation for victims.[81] The AEDPA was also a sharply targeted piece of legislation, rooted in a clearly recognizable objective to deter international terrorism[82] and provide restitution to Americans injured by the actions of hostile governments.[83]

Title II of the AEDPA carved out new exceptions to the FSIA for governments that have been designated by the United States Department of State as supporters of terrorism.[84] Currently, Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan are included in this list.[85] Once a government is designated a state sponsor of terrorism, Americans may bring suit against it for compensatory damages arising from acts of "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" committed by the foreign government or its agent,[86] or for materially

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78. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 1605, 1610 (2000).

79. CHARLES DOYLE, FEDERATION OF AMERICAN SCIENTISTS, ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A SUMMARY (June 3, 1996), *at* http://www.fas.org/irp/crs/96-499.htm. The author explains, however, that these incidents were not the only reasons for the Act's passage:

> The bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and to a lesser extent the bombing of the World Trade Center in New York, supplied the most obvious stimuli for its enactment, but concern over other issues such as habeas corpus and immigration contributed to its passage as well.

Id.

80. *But see* Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 84 (1998) (arguing that the amendment to the FSIA should have gone much further, so that plaintiffs could sue a broader range of nations for a more extensive spectrum of human rights violations).

81. DOYLE, *supra* note 79.

82. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 12 (D.D.C. 1998) (explaining the legislative goals behind the AEDPA).

83. *See* Antiterrorism and Effective Death Penalty Act of 1996; William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 150 (2002).

84. *See* 28 U.S.C. § 1605(a)(7) (2000).

85. Office of Foreign Assets Control, Department of the Treasury, 31 C.F.R. § 596.201 (2004).

86. 28 U.S.C. § 1605(a)(7)(A). The *Flatow* court elucidated the current state of the law: "The law of *respondeat superior* demonstrates that if a foreign state's agent, official or employee provides material support and resources to a terrorist organization, such provision will be considered an act within the scope of his or her agency, office or employment." 999 F. Supp. at 18.

supporting an act of terrorism.[87] Later, Congress amended Title II to allow punitive damages.[88]

In addition to creating new opportunities for Americans to pursue claims against foreign governments,[89] the drafters of the AEDPA also

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However, the court went on to explain that "[i]n order for an agent, official, or employee's unlawful conduct to be imputed to a government . . . the government must share a degree of responsibility for the wrongful conduct. The government must have engaged in the wrongful conduct, either deliberately or permissively, as a matter of policy or custom." *Id.* (citing Monell v. N.Y. Dep't of Soc. Servs., 436 U.S. 658, 694-95 (1978)).

87. 28 U.S.C. § 1605(a)(7). As the *Flatow* court further explained, a causal connection between the support and the harmful act is not necessary because:

> a plaintiff need not establish that the material support or resources provided by a foreign state for a terrorist act contributed directly to the act from which his claim arises in order to satisfy [FSIA]'s statutory requirements for subject matter jurisdiction. Sponsorship of a terrorist group which causes the personal injury or death of a United States national alone is sufficient to invoke jurisdiction.

999 F. Supp. at 18.

88. On September 30, 1996, Congress added a statutory note, entitled "Civil Liability for Acts of State Sponsored Terrorism," to 28 U.S.C. § 1605. *See* Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605(a)(7)). That note explains, in pertinent part:

> (a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to the United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent . . . for money damages which *may include economic damages, solatium, pain, and suffering, and punitive damages*. . . .

Id. (emphasis added). One court provided a detailed summary of the legislative intent behind the punitive damages exception:

> Although the Antiterrorism Act created a forum competent to adjudicate claims arising from offenses of this nature, serious issues remained, in particular, the causes of action available to plaintiffs. . . . [I]n order for the exception for immunity to have the desired deterrent effect, the potential civil liability for foreign states which commit and sponsor acts of terrorism would have to be substantial. Therefore, the amendment . . . expressly provided, inter alia, that punitive damages were available in actions brought under the state sponsored terrorism exception to immunity.

Flatow, 999 F. Supp. at 12 (citations omitted).

89. Indeed, many suits were brought following passage of this Act, and plaintiffs often were awarded large compensatory and punitive damages awards. *See, e.g.*, Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000) (awarding a kidnapped journalist and his family compensatory damages of approximately $24.5 million and punitive damages of $300 million against the Iranian Ministry of Information and Security); Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding the families of the Brothers to the Rescue pilots who were

sought to expand a plaintiff's ability to collect judgments against foreign governments.[90] Specifically, the AEDPA declares that any property owned by a state sponsor of terrorism is subject to attachment in a civil lawsuit maintained pursuant to one of the exceptions to the FSIA if the property is located within the United States and used for commercial purposes.[91] Notwithstanding this revision, the task of collecting against foreign governments remained virtually impossible, and plaintiffs who brought lawsuits under the new exception typically were unable to enforce their judgments.[92]

C. *Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999*

The rights afforded to plaintiffs under the AEDPA would be meaningless if plaintiffs were not able to collect judgments.[93] Recognizing this reality, lawmakers began to pass laws that would allow the enforcement of judgments against broader ranges of property owned by defendant governments. The first of these, contained within the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999[94] (OCESA), was a bold legislative attempt to enable courts to attach an

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shot-down by the Cuban Air Force almost $12 million in economic losses, approximately $38 million for pain and suffering, and $137.7 million in punitive damages).

90. Congress amended section 1610 of the FSIA by adding the following provision:

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(7).

91. *Id.* § 1610; *see also supra* note 76.

92. *See, e.g.*, Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1072-73 (9th Cir. 2002) (holding that the plaintiff did not prove that Bank Saderat Iran was an entity of the state of Iran subject to execution of a judgment against Iran based on a suit brought under the newly amended FSIA).

93. Although it is never entirely clear whether the goal of deterrence has been achieved, it seems fairly certain that deterrence can work only when the threatened response is carried out. In this context, deterrence can be achieved only if nations are required to pay the judgements against them. Similarly, compensation of victims is achieved only when a transfer of wealth occurs. Large judgments that are left unpaid may provide a symbolic victory, but they do little to advance these important goals.

94. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). The legislation added 28 U.S.C. § 1610(f) and modified 28 U.S.C. § 1606, 112 Stat. at 2681-491.

almost limitless range of property owned by an officially designated terrorist state.[95] First, the OCESA authorized attachment of blocked property,[96] or those assets frozen by the President pursuant to the Trading with the Enemy Act of 1917[97] or the International Emergency Economic Powers Act.[98] In addition, the OCESA expressly permitted courts to attach and enforce judgments against diplomatic and consular properties, despite special protections afforded under international law.[99]

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95. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 § 117, 112 Stat. at 2681-491.

96. 28 U.S.C.A. § 1610(a)(f)(1)(a) (West 2004) (explaining that American courts hearing a case pursuant to the FSIA may attach any property "with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), [or] sections 202 and 203 of the International Emergency Powers Act (50 U.S.C. 1701-1702)").

97. 50 U.S.C. app. § 5 (2000). The Trading with the Enemy Act of 1917 provides executive authority during times of war to:

> [I]nvestigate, regulate . . . nullify, void . . . or prohibit, any . . . transactions involving . . . any property in which any foreign country or a national thereof has any interest . . . and any property or interest of any foreign country or national thereof shall vest . . . upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.

Id. § 5(b).

98. 50 U.S.C. §§ 1701-1707. This act permits a President, in times of national emergency, to exercise essentially the same powers provided in the Trading with the Enemies Act. *Id.*; *cf. supra* note 97. In addition, "when the United States is engaged in armed hostilities or has been attacked by a foreign [entity]," this section permits the President to:

> [C]onfiscate any property, subject to the jurisdiction of the United States, of any foreign [entity] that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest . . . in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States . . . .

50 U.S.C. § 1702(a)(1)(C). As the United States Supreme Court explained in *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981), the President's ability to block assets is an important mode of carrying out foreign policy objectives.

99. This provision was codified in section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-491 (1998) (codified as 28 U.S.C. §§ 1606, 1610). The provision represented a significant departure from traditional foreign sovereign immunity law in the United States and internationally—both legal systems have

However, these provisions would not stand for long. The OCESA also permitted the President to expressly override the attachment of property.[100] President Clinton swiftly executed a blanket waiver, thereby removing any opportunity to attach blocked assets or diplomatic and consular property.[101] The OCESA was later revised to exempt diplomatic and consular property,[102] as well as property involved in transactions awaiting final determination by the federal government.[103] As the following section reveals, the struggle continued in subsequent legislative efforts to achieve the congressional goal of developing more efficient judgment enforcements against state sponsors of terrorism.

D. *Victims of Trafficking and Violence Protection Act of 2000*

Congress intended the Victims of Trafficking and Violence Protection Act of 2000[104] (VTVPA) to apply to specific plaintiffs who sought judgments against the nations of Cuba and Iran that were otherwise unenforceable against frozen assets due to President Clinton's waiver of

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consistently granted express immunity for diplomatic and consular property. For a thorough discussion of the domestic and international laws that carve out special protection for diplomatic and consular property, see *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1252 n.4 (D.C. Cir. 2002) (referencing the "Statement of Interest of the United States"). Specifically, the government identified three authorities for its position in the *Flatow* case that diplomatic and consular property should not be attached: 1) The Foreign Missions Act (FMA) expressly precludes the attachment of such properties; 2) The FSIA provides a general source of immunity that can be penetrated only through a specific exception, and no such exception has been made in the case of property used for diplomatic purposes; 3) The United States is required to protect diplomatic and consular property under the terms of the Vienna Convention on Diplomatic Relations. *Id.*

100. 28 U.S.C. § 1610(f)(1)(d) permits the President to exercise a waiver in order to advance other foreign relations goals or protect domestic security.

101. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998) (stating that the President excercised the waiver primarily in the interest of national security and foreign diplomatic relations); *see also* Bill Miller, *Terrorism Victims Set Precedent: U.S. to Pay Damages, Collect from Iran*, WASH. POST, Oct. 22, 2000, at A1. The President's ability to waive § 1610(f) in the national interest was once again articulated in 28 U.S.C. § 1610(f)(3). *See infra* Part III.D (explaining the Victims of Trafficking and Violence Protection Act). However, after President Clinton exercised the waiver according to the clearer legislative directive, subsequent legislation defined additional opportunities for plaintiffs to collect against foreign governments. *See* Presidential Determination 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000); *see also* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-40 (2002) (codified in scattered sections of 15 U.S.C.).

102. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

103. *Id.* The exclusion applies to property that "is subject to a license issued by the United States government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute." *Id.*

104. Pub. L. No. 106-386, 114 Stat. 1464 (2000).

the OCESA.[105] The statute permitted these individuals either to obtain an amount equal to the value of their compensatory damages award from the United States Treasury Department in exchange for a relinquishment of claims for punitive damages or to seek fulfillment of compensatory and punitive damages from the attachment of any property belonging to the defendant nation and subject to blocking statutes.[106] Immediately upon signing the VTVPA into law, President Clinton issued a blanket waiver to protect diplomatic and consular property as well as blocked assets.[107]

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105. *Id.* § 2002. The law applied only to plaintiffs who already held a final judgment against Iran or Cuba or who already had initiated a lawsuit against either nation on one of five dates listed within the statute. *See id.*; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L. L. 132, 138 (2001). The law was intended to satisfy the judgments of plaintiffs in cases already decided under the laws discussed in prior sections. *See id.*

106. *See* Victims of Trafficking and Violence Protection Act of 2000 § 2002. This is a simplified summary of what are actually three choices:

> First, [plaintiffs] may obtain from the Treasury Department 110 percent of the compensatory damages awarded in their judgments, plus interest, if they relinquish all rights to compensatory and punitive damages awarded by U.S. courts. Second, they may obtain from the Treasury Department 100 percent of the compensatory damages awarded in their judgments, plus interest, if they relinquish (a) all rights to compensatory damages awarded by U.S. courts and (b) all rights to execute against or attach certain categories of properties, including property that is at issue in claims against the United States before an international tribunal.

Murphy, *supra* note 105, at 138 (footnotes omitted). The enactment also emerged from a much more narrowly construed legislative interest. As the preamble declares, the VTVPA was intended to deter international trafficking of persons for prostitution, slavery, and other forms of involuntary servitude. Pub. L. No. 106-386, 114 Stat. 1464.

107. *See* Determination to Waive Attachment Provisions Relating to Blocked Property of Terrorist-List States, Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000). This move rendered ineffectual the Act's provisions authorizing plaintiffs to collect punitive damages. The waiver, executed on November 6, 2000, declared:

> By the authority vested in me as President by the Constitution and laws of the United States of America, including [the VTVPA], I hereby determine that subsection (f)(1) . . . which provides that any property [seized under United States blocking statutes] be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of the courts of the United States or of the States [under the FSIA], would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of [the blocking statutes]. Therefore . . . I hereby waive subsection (f)(1) of section 1610 of title 28, United States Code, in the interest of national security.

Id. Despite this waiver, however, the executive branch did permit the release of blocked Cuban assets to satisfy the claims arising out of *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). *See* Taylor, *supra* note 17, at 541.

Without these options, plaintiffs were left with only the opportunity to collect compensatory damages from the United States Treasury Department.[108]

E. *Terrorism Risk Insurance Act of 2002*

The TRIA[109] is the culmination of legislative effort to deter global terrorism and facilitate collection of monetary judgments against foreign governments.[110] Title II of the TRIA is a near replica of the previously waived provisions of the OCESA.[111] However, the newer version applies to *all* future plaintiffs bringing suit against state sponsors of terrorism and specifically limits the presidential waiver option.[112] The TRIA requires the President to perform an "asset-by-asset" appraisal before issuing any waiver and also voids all previous blanket waivers.[113] Additionally, the statute authorizes the President to waive enforcement only against certain types of diplomatic property, so that most blocked assets remain within plaintiffs' reach.[114] The TRIA thus marked the end of

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108. The Treasury Department paid approximately $350 million to satisfy claims in nine out of ten suits against Iran. Taylor, *supra* note 17, at 541; Neely Tucker, *Damages Awarded to Terror Victim's Family*, WASH. POST, Feb. 7, 2002, at A26. However, even recipients considered the source of these payments controversial. *See* Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1058 (2002) ("Susan Cohen, an active victims' rights advocate whose daughter died in the crash of Pan Am Flight 103 [stated] 'I'm no saint, but I could not take money this way. . . . It doesn't punish terrorists, it punishes U.S. taxpayers.'").

109. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified in scattered sections of 15 U.S.C.).

110. *See supra* Parts III.C-D.

111. *Compare* Terrorism Risk Insurance Act of 2002 § 201, *with* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491. Indeed, the name of the TRIA section reflects the purposes of the OCESA: "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism." Terrorism Risk Insurance Act of 2002 § 201.

112. *See* Terrorism Risk Insurance Act of 2002 § 201(a)-(b)(2)(B).

113. *See id.* The legislation provides, in pertinent part:

> [U]pon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

Id. § 201(b)(1).

114. *Id.* Specifically, the statute excludes property subject to the Vienna Convention. *Id.* In part, that Agreement requires the United States to protect the premises of diplomatic and consular missions, as well as any other property contained therein. *See id.*

a long and often turbulent battle to develop laws that would enable Americans to sue and enforce judgments against foreign governments. Throughout these legislative labors, the underlying goal has remained remarkably unchanged. Congress has sought to deter state-supported violence against Americans and permit plaintiffs to obtain restitution.

IV. APPLICABLE CANONS OF CONSTRUCTION

As Part I revealed, the TRIA and the Hague Convention directly clash in the case of the biplane, creating what is essentially an intrajurisdictional conflict-of-laws question.[115] Traditionally, one resolves conflicts between laws of the same sovereign government through application of the canons of construction.[116] The canons provide rules of interpretation and direct courts to prioritize laws in a certain manner.[117] Often, the canons provide clear outcomes, so that laws can be applied logically and consistently despite facial disagreement.[118]

Despite their utility, contemporary courts regularly ignore the canons[119] and view them as antiquated rules that have little use in today's post-modern, standards-based jurisprudence.[120] In many cases, the canons are

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115. *Gordon v. New York Stock Exchange, Inc.* provides a good example of intrajurisdictional conflict of law. 422 U.S. 659 (1975) (addressing a conflict between the Sherman Antitrust Act and the Securities Exchange Act); *see also* Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985) (addressing a conflict between two laws of Congress, Federal Rule of Civil Procedure 69 and 42 U.S.C. § 1988).

116. 73 AM. JUR. 2d *Statutes* § 168 (2004) provides a thorough overview of the ways in which canons of construction may be used to reconcile conflicts by two laws passed by the same governmental entity.

117. *See infra* Part IV.B (discussing, *inter alia*, canons of construction based on timing of the conflicting laws and the type of law).

118. For example, one rule of construction declares that when two laws conflict, the more specific should govern the more general. *See, e.g.*, Edmond v. United States, 520 U.S. 651, 657 (1997). Since this canon is relatively easy to apply, outcomes can often be predicted based on this rule.

119. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting) (claiming that the majority failed to apply the applicable *Charming Betsy* doctrine when resolving a conflict between a treaty and a statute); Kathleen M. O'Sullivan, Note, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123, 138 (1995) (asserting that the United States Supreme Court "ignored the general rules of statutory construction" when it decided *United States v. Mitchell*, 463 U.S. 206 (1983)).

120. *See, e.g.*, Eric S. Lasky, Note, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 914 (1999) ("[T]he plain meaning rule [when classified as a canon of construction] has been used by judges to justify judicial decisions, instead of facing complex or controversial social or policy issues."). Lasky further provides an excellent summary of another work reaching a similar conclusion:

> Professors Jonathan Macey and Geoffrey Miller pose the hypothetical of a judge who could decide a case one way by invoking the canons of statutory construction

also self-contradicting because competing canons often apply to the same case or controversy.[121] With regard to conflicts between treaties and statutes, the use of canons has been criticized as a covert means by which judges vastly impact foreign relations.[122] Some strict canons can lead courts swiftly to dismiss important international agreements,[123] while others can guide courts to overstep judicial powers by granting unwarranted supremacy to international laws.[124] As the following sections reveal, these criticisms become even more apparent when we apply the canons in the case of the biplane.

> or the plain meaning rule, or another way by invoking a public policy rationale. Macey and Miller further hypothesize that societal wealth and human flourishing would increase dramatically if the decision were made on the basis of public policy, but would diminish just as dramatically if the canons of construction or the plain meaning rule were invoked.

Id. (discussing Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649-56 (1992)) (footnotes omitted).

121. Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 505 (1998) ("'[T]here are two opposing canons on almost every point.'" (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950))). In addition:

> critics claim that canons do not provide any meaningful restraint on judicial decisionmaking. Because of the existence of counter-canons and the selective use of canons by judges, critics argue that canons "are useful only as facades, which for an occasional judge may add lustre to an argument persuasive for other reasons."

Id. (quoting FRANK C. NEWMAN & STANLEY S. SURREY, LEGISLATION—CASES AND MATERIALS 654 (1955)).

122. *See infra* note 123.

123. For instance, the rule of subsequent acts of Congress would lead a court to dismiss an international treaty because of an expressly inconsistent domestic statute.

124. For a criticism of one rule of construction, the *Charming Betsy* doctrine, as a means by which international law is able to trump domestic enactments, see Bradley, *supra* note 121, at 483. Bradley notes:

> This indirect, "phantom" use of international law can, in some cases, have the same effect as direct incorporation of international law. Indeed, it is arguable that, "when actual congressional intent is ambiguous or absent," applying the *Charming Betsy* canon "is the same as creating a rule that the government regulatory scheme cannot violate international law."

Id. (footnote omitted).

A. *The Rule of Liberal Construction of International Treaties*

The United States Constitution declares that all treaties made by the United States should be considered the "supreme law of the land."[125] This broad deference to foreign relations resolutions is also reflected in rules governing the interpretation of treaties. The United States Supreme Court consistently has upheld Justice Story's liberal rule of construction: "[i]f the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; . . . the most liberal exposition [should] be adopted."[126] When applying a treaty's provisions to a fact pattern, courts should be mindful of the objectives that precipitated the agreement and advance an interpretation that preserves equality and reciprocity between contracting nations.[127] Since treaties are essentially "contracts between independent nations, . . . words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."[128] Additionally, courts should clarify any ambiguities with reference to the parties' conduct after ratification of the agreement.[129] Therefore, courts should identify the broader intent of the parties, as demonstrated by the language of the agreement and the parties' successive conduct, and yield to the interpretation that broadens, rather than restricts, the underlying goals that the agreement seeks to advance.[130]

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125. U.S. CONST. art. VI, cl. 2; *see also* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992) (explaining that "the Arbitration Convention . . . is the supreme law of the land . . . and controls any case in any American court falling within its sphere of application" (citation omitted)).

126. Shanks v. DuPont, 28 U.S. 242, 249 (1830); *see also* Jordan v. Tashiro, 278 U.S. 123, 128-29 (1928) (interpreting a treaty liberally, so that "trade" or "commerce" also would include operation of a hospital); Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) (interpreting a treaty liberally so that pawnbrokers are included in the definition of "trade"); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) (asserting that the rule adopted in *Shanks* was the fundamental rule of construction for treaties signed by the United States).

127. De Geofroy v. Riggs, 133 U.S. 258, 271 (1890).

128. *Id.*; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325 (1987) (stating, "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose").

129. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325. That section provides: "Any subsequent agreement between the parties regarding the interpretation of the agreement, and *subsequent practice* between the parties in the application of the agreement, are to be taken into account in its interpretation." *Id.* (emphasis added).

130. The Court explained in *Barcardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940):

A court applying these principles in the case of the biplane could construe the Hague Convention's guarantee that "[Contracting States] shall without delay return the [unlawfully seized] aircraft and its cargo to the persons lawfully entitled to possession"[131] to mean that participating nations agreed that when an aircraft is brought to foreign territory as a result of an unlawful seizure, the host nation should exercise dominion and control over the aircraft only for the purpose of returning it to its nation of origin.[132] Such an interpretation likely would advance the important interest of reciprocity.[133] Since domestic laws can change over time and from one nation to the next, the Hague Convention would be far more complex if taken to mean that states should return aircraft *unless domestic laws require some other proceeding or disposition.* Since the Hague Convention and its predecessor treaties exemplify a global intent to grant civil aircraft a protected status that does *not* hinge on political relations between nations, any reading that places aircraft at the mercy of local laws and courts clearly would defeat this intent.

Additionally, the phrase "persons lawfully entitled to possession"[134] could be construed according to the probable meaning assigned by nations at the time of signing; the Chicago and Geneva Conventions clearly establish that the international community intended to protect the *registered* foreign owners of aircraft, and not simply "aircraft owners" in some abstract, ever-changing sense.[135] In contrast, an interpretation that defines this phrase based on domestic laws that enable a plaintiff to attach and enforce a judgment against any property belonging to the defendant foreign government would be a flagrant violation of the rule against defining terms in an "artificial or special sense impressed . . . by local laws."[136] Indeed, at the time of the biplane's arrival in the United States, the local law enabling Martinez to enforce her judgment against the

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> According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

(citing *Jordan*, 278 U.S. 123). Courts also should make every attempt to advance the underlying purpose of the treaty because it reflects the intentions of such "high contracting parties." Sullivan v. Kidd, 254 U.S. 433, 439 (1921).

131. Hague Convention, *supra* note 8, at art. 9, para. 2.

132. The promise to return aircraft "without delay" can be read to indicate that no judicial process, however summary, will be required or even permitted prior to release of the aircraft.

133. *See* Asakura v. City of Seattle, 265 U.S. 332, 342 (1924).

134. Hague Convention, *supra* note 8, at art. 9, para. 2.

135. *See supra* text accompanying notes 50-59.

136. *See* De Geofroy v. Riggs, 133 U.S. 258, 271 (1890).

aircraft was not even in force.[137] Finally, courts could resolve any remaining ambiguity through review of the parties' course of conduct with respect to the Hague Convention's mandate. Since the United States and Cuba, as well as all other signatory nations, consistently have abided by the agreement and returned aircraft without hesitation,[138] any argument for ambiguity seems to have little merit.

In summary, the rules governing interpretation of treaties suggest that the only legitimate reading of the Hague Convention is one that discounts Martinez's rights under the TRIA. The next question is whether the subsequent passage of the TRIA overruled the terms of the Hague Convention.

B. *The "Last-in-Time" Principle and the* Charming Betsy *Doctrine*

Although treaties are supreme law, subsequent federal statutes may overrule a treaty. This is because acts of Congress and international treaties are considered to be of equal importance.[139] In *Whitney v. Robertson*,[140] the United States Supreme Court enunciated the "last-in-time" principle: when a successive statute is expressly inconsistent with a treaty, the statute overrules the treaty[141] for domestic purposes[142] wherever they are in conflict.[143] When the statute does not expressly overrule

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137. *CNN Wolf Blitzer Reports*, *supra* note 11.

138. *Id.*

139. Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("[A] treaty is placed on the same footing . . . with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."); *see also* Breard v. Greene, 523 U.S. 371 (1998) (reaffirming the *Whitney* rule).

140. 124 U.S. 190.

141. *Id.* at 194; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (holding that a treaty "can be deemed . . . only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In any case the last expression of the sovereign will must control"); Edye v. Robertson, 112 U.S. 580, 597-99 (1884); The Cherokee Tobacco, 78 U.S. 616, 621 (1870) ("The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But [there is no] doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." (footnote omitted)).

142. James A.R. Nafziger & Edward M. Wise, *Section IV: The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 425 (1998) (explaining that the treaty is still valid internationally and that the United States still would be bound by its terms in the international arena).

143. *Id.*; *see also Whitney*, 124 U.S. at 194 (stating that when a federal statute expressly conflicts with an international treaty, "the one last in date will control the other"). There are numerous arguments to support continued application of this canon of construction:

> [T]he first of three reasons usually given for the later-in-time rule interprets [the notion of equality between the three branches of government] to mean that the latest sovereign act should govern. Proponents of the second reason see no

the treaty,[144] additional rules of construction apply. According to *Whitney*, when a treaty and an act of Congress relate to the same subject without containing express language of repeal, courts should "endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."[145] If the two cannot be reconciled so as to give effect to both, then courts historically have interpreted specific provisions of the conflicting statute and treaty according to the *Charming Betsy* doctrine, which declares that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[146] Therefore, in recognition of a presumption that Congress typically does not intend to overrule international treaties,[147] statutes must yield to treaties

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> justification for preferring an act in which only two parties—the president and the Senate—cooperate over one in which the House of Representatives also participates. Those who advance the third reason argue that interference by the courts would impede the proper functioning of the political branches in foreign affairs.

Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313-14 (2001).

144. The term "expressly," as a qualifier, is based on other language used in *Whitney*, subsequent case law, and other corollary canons of construction. *See Whitney*, 124 U.S. at 195 ("[W]hen a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government."); *see also* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest...."); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1263, 1266 (E.D. Pa. 1980) (holding that before determining that a treaty or a statute has overruled the other, courts "must examine the language of the statute and of the treaty to determine whether there is 'a positive repugnancy' between them, which renders them irreconcilable. Second, [courts] must examine the legislative history of the Treaty to determine whether there is 'some affirmative showing of an intention to repeal'" (citations omitted)), *aff'd in part, rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 319, 323-24 (3d. Cir. 1983).

145. *Whitney*, 124 U.S. at 194 (holding further, "if the two are inconsistent, the one last in date will control the other"); *see also* Kelly v. Hedden, 124 U.S. 196 (1888) (asserting that the rule of *Whitney* normally would apply, but it was not necessary to resolve the case because the challenged statute contained a clause providing that it should not be interpreted to violate any treaty of the United States).

146. *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

147. This possible justification for the rule of construction is discussed in Bradley, *supra* note 121, at 495-97 ("Congress generally does not wish to violate international law because, among other things, such violations might . . . create foreign relations difficulties for the United States. . . . [O]ne could argue that Congress has been on notice that if it intends to violate international law, it must make that intent clear."); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 115 cmt. a (1987) ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law...."). *But see* Vagts, *supra* note 143, at 319 (discussing *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), in which the court looked to legislative intent and determined that Congress intended that the Byrd Amendment would cause the United States to violate international agreements).

when no other reconciliation is possible.[148]

The first question to be determined in the case of the biplane is whether a successive statute that provides a right to enforce judgments against a wide range of assets belonging to certain defendant foreign governments should be interpreted to overrule the Hague Convention's guarantee that "[Contracting States will] without delay return the [unlawfully seized] aircraft and its cargo to the persons lawfully entitled to possession."[149] A court may find that the TRIA has overruled the Hague Convention. Since the TRIA does not provide a catalog of property to which it may be applied, its reach is limited only by the specific exclusions contained therein. Most notably, the statute declares that plaintiffs may not attach diplomatic or consular property.[150] A court may conclude that Congress did not intend to uphold the provisions of the Hague Convention, since despite significant deliberation over the protection of diplomatic and consular property during the initial passage of, and subsequent revisions to, the OCESA, the VPVTA, and the TRIA, it did not similarly exclude protected aircraft in the final draft of the TRIA.[151] In fact, Congress's

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148. *See The Schooner Charming Betsy*, 6 U.S. at 118 (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (holding that "courts will not blind themselves to potential violations of international law where legislative intent is ambiguous"); United States v. Georgescu, 723 F. Supp. 912, 921 (E.D.N.Y. 1989); United States v. Palestine Liberation Org., 695 F.Supp. 1456, 1468 (S.D.N.Y. 1988) (explaining that only "the clearest of expressions on the part of Congress" should be found to overcome the *Charming Betsy* doctrine); Peters v. McKay, 238 P.2d 225, 231 (Or. 1951) ("[I]n construing a statute, [courts] will indulge a strong presumption that the legislature did not intend to violate international law and will read into a statute such qualification or exceptions as may be necessary to avoid apparent conflict." Courts will apply this presumption "unless it unmistakably appears that a statute was intended to be in disregard of a principle or international law."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

149. Hague Convention, *supra* note 8, at art. 9, para. 2.

150. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-40 (2002) (codified in scattered sections of 15 U.S.C.).

151. The legislative history, including frequent battles regarding the exclusion of diplomatic and consular property, perhaps demonstrates a congressional intent to create a broad statute that would reach property normally protected by international agreements. *See supra* Part III. Congress's repeated attempts to reinsert diplomatic and consular property demonstrates this intent, and one could argue that Congress finally agreed to exempt such diplomatic and consular property only in order to pass the legislation. These arguments could demonstrate intent to overrule, since courts have found that even where the act of Congress does not expressly overrule the provisions of a treaty, other evidence of a manifest intent to overrule the international obligation may be sufficient evidence of an overruling. *See, e.g.*, Kappus v. Comm'r of Internal Revenue, 337 F.3d 1053, 1057 (D.C. Cir. 2003) (finding that even though a statute did not contain any mention of a treaty, and therefore did not expressly overrule it, Congress passed subsequent legislation that indicated a broad intent to give priority to statutes relating to revenue collection); S. African

attempts through prior legislation to enable plaintiffs to reach property normally protected by international agreements may evince intent to provide plaintiffs a virtually limitless ability to obtain compensation.[152] A court adopting this argument would conclude that the TRIA circumscribed the protections afforded by the Hague Convention, so that the treaty would not protect aircraft owned by defendant nations.

On the other hand, a court could find that the TRIA did not overrule the Hague Convention because, unlike statutes typically construed to repeal treaties,[153] the TRIA does not contain any express mention of the Hague Convention or that treaty's very precise subject matter. Indeed, the subsequent statute is so broad, and the treaty so narrow,[154] that a court easily could find that Congress did not intend to overrule the Hague Convention, but rather neglected even to consider application of the TRIA to unlawfully seized aircraft.[155] If a court adopts this position, not only would the statute fail to meet *Whitney*'s requirement of an express overruling, but the additional, corollary canon of construction disfavoring implicit overrulings would further prevent a court from finding that the TRIA overruled the Hague Convention.[156]

Airways v. Dole, 817 F.2d 119, 123 (D.C. Cir. 1987) (looking to the legislative history of a statute to determine whether overruling was intended and finding that "there is no indication in the legislative history to suggest that in adopting the Anti-Apartheid Act as amended, Congress intended to abrogate any provision of the Agreement").

152. *See supra* note 151.

153. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998). In *Breard*, the Court found that the Antiterrorism and Effective Death Penalty Act,

> which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." [Thus, the AEDPA modifies] Breard's ability to obtain relief based on violations of the Vienna Convention [.]

Id. (citations omitted).

154. Indeed, even this difference between the two laws could awaken another canon of construction that would yield a similar answer. *See* Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

155. It is not unusual for courts to surmise that legislators simply failed to consider the interplay between new laws and those currently in operation. *See* Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983) (finding that "[t]he legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court promulgated almost 40 years earlier"), *rev'd*, 473 U.S. 1 (1985) (overruling the lower court, but impliedly recognizing that there are situations where legislatures fail to consider the ramifications of their actions).

156. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (identifying "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action"); *see also* Cook v. United States, 288 U.S. 102, 120

If a court determines that the TRIA has not overruled the Hague Convention, the next inquiry would focus on possible reconciliation of the conflicting laws. First, the TRIA and the Hague Convention broach the same subject matter, so that a court should attempt to interpret each in a manner that leaves the other intact.[157] Specifically, the TRIA and the Hague Convention reflect a desire to deter acts of international violence. Since the TRIA enables plaintiffs to reach a broad range of property,[158] and since the Hague Convention only protects civil aircraft that have been brought to another nation by acts of air piracy,[159] the two laws easily could co-exist. For example, a plaintiff would retain a broad right of enforcement under the TRIA, but the Hague Convention would exclude protected aircraft.[160] On the other hand, a court just as easily could find that the two laws do not broach the same subject matter: the Hague Convention governs aircraft hijackings, whereas the TRIA concerns the enforcement of domestic judgments.[161] A court adopting this latter approach would not be bound to interpret the two laws in a mutually protective manner.[162] However, the court nonetheless should reach the same result in this case through application of the *Charming Betsy* doctrine, which directs courts to handle irreconcilable inconsistencies between a statute and a treaty by interpreting the statute in a manner that does not offend the treaty.[163] As in the preceding example, the TRIA would continue to permit plaintiffs to enforce judgments against a wide range of property, but aircraft protected by the Hague Convention would remain beyond reach.

Although this analysis seems straightforward enough, there is significant potential for varying outcomes. Since the canons are not driven

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(1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); Chew Heong v. United States, 112 U.S. 536, 550 (1884) (finding that absent any express language of repeal, a subsequent legislative enactment is presumed to have been passed with knowledge that the treaty would nonetheless circumvent the statute in cases pertaining to the same subject matter). This is also consistent with more general canons of construction which disfavor implied rescissions of laws. *See, e.g.*, United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976) (citing the "cardinal principle of statutory construction that repeals by implication are not favored").

157. Such a reading would be consistent with the rule articulated in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

158. *See supra* Part III.E.

159. *See* Hague Convention, *supra* note 8, Preamble.

160. Consider, for example, the case of the biplane. Even if Martinez had been prevented from attaching the biplane, she still would be able to enforce her judgment against other blocked property. The biplane, with its estimated worth of thirty to forty thousand dollars, is not critical to her right to receive compensation.

161. *See supra* Parts II-III.

162. This is because the *Whitney* rule requires only that courts apply a statute and treaty in a mutually protective manner when the two relate to the same subject. *See supra* notes 139, 143.

163. *See supra* note 148.

by a review of policy or legislative interests, the divergent outcomes occur when courts decline to apply a certain canon. For example, courts occasionally ignore the *Charming Betsy* doctrine.[164] A court declining to apply that canon most likely would revert back to the last-in-time principle in the face of an irreconcilable conflict between a statute and a treaty.[165] The last-in-time principle would direct a court to apply the TRIA's provisions to the case at the expense of the Hague Convention, since the TRIA is the more recent enactment. While both laws would remain in force, the TRIA's broad provisions would render the Hague Convention powerless in the case of the biplane.

In summary, the canons of construction do not categorically resolve the matter. Although the canons are strict rules, different applications lead to varying outcomes, and failure to apply any one canon can transform the analysis.[166] Since the canons do not consider legislative interests or policy arguments, the analysis can appear quite mechanical. However, this does not mean courts lack discretion. In the case of the biplane, courts are left with ample opportunity to find that the TRIA overruled the Hague Convention or that the two laws must be reconciled so that both remain effective. Even when a court seeks to reconcile the two laws, varying results are still possible. Courts could apply the *Charming Betsy* doctrine to favor the treaty's provisions and the "last-in-time" principle to favor the statute's provisions.[167] At each juncture, judges can peer ahead at numerous outcomes, choose the one that appears the most fair, and then write an analysis that applies those canons that lead to the chosen end.[168] In recognition of this large amount of judicial discretion, scholars have argued that the so-called "strict" canons of construction do not make the ultimate determination any less discretionary for courts, and the actual means by which courts resolve intrajurisdictional conflict of laws questions actually may resemble the interest analysis approach to interstate conflicts—albeit performed in a covert, unpublicized manner.[169] The

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164. *See supra* note 119.

165. *See supra* note 141.

166. For example, a court could decline to apply the *Charming Betsy* doctrine and instead simply use the "last-in-time" principle. In that case, the TRIA would be interpreted to overrule the Hague Convention, even though the *Charming Betsy* doctrine would have forced the court to construe the TRIA in a manner that leaves the treaty intact.

167. It is unclear which of these paths the trial court adopted in the actual case of the biplane, since no written opinion is available. There is always a chance that the canons were ignored or that the court simply applied the "last-in-time" principle and adopted the TRIA.

168. *See, e.g.*, O'Sullivan, *supra* note 119, at 138 (asserting that the United States Supreme Court "ignored the general rules of statutory construction" when it decided *United States v. Mitchell*, 463 U.S. 206 (1983), in order to reach a preferred conclusion).

169. CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 119-20 (David P. Currie et al. eds., 6th ed. 2001). At the beginning of a chapter introducing the interest analysis approach to conflicts,

following section provides an introduction to the modern interest analysis paradigm and explores whether an overt application of interest analysis would enable courts to resolve cases in a more predictable manner.[170]

V. THE MODERN INTEREST ANALYSIS PARADIGM

Interest analysis, developed by Professor Brainerd Currie,[171] begins with a supposition that every law is designed to advance certain societal purposes.[172] Despite the logic inherent in this realism, traditional conflicts paradigms often failed to advance legislative goals.[173] Like the canons of construction, traditional choice-of-law approaches favored strict rules that often neglected to take into account deeper interests of the states.[174] Moreover, just as courts sometimes ignore canons of construction in order to reach more favorable outcomes, so-called "escape devices"[175] steadily

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the text presents *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), and the reversal opinion in *Marek v. Chesney*, 473 U.S. 1 (1985). Both opinions address a conflict between two laws of Congress, Federal Rule of Civil Procedure 68 and 42 U.S.C. § 1988. *See Marek*, 473 U.S. at 1; *Chesny*, 720 F.2d at 474. The opinions of the Seventh Circuit Court of Appeals and United States Supreme Court demonstrate the use of what appears to be an interest analysis to resolve an intrajurisdictional conflict, even though interest analysis is supposedly only an approach to *interstate* conflicts questions. *See* CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS, *supra*, at 120-21. In the notes following the cases, the editors cite numerous other cases that address conflicts between two laws of the same sovereign and conclude that interest analysis seems to be the actual manner by which courts always resolve intrajurisdictional choice of law questions. *See id.* A similar argument is made in Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CAL. L. REV. 845, 852-53 (1961) (asserting that courts often weigh competing interests to resolve intrajurisdictional conflict of laws).

170. The importation of conflicts analyses, and more specifically, interest analysis, into other areas of law is not an idea that is novel to this Note. *See generally* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999) (considering whether this approach could be applicable to the *Erie* analysis in Civil Procedure).

171. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

172. *See id.* This is inherent in Currie's analysis; throughout the article, he suggests that states have important interests which are advanced when specific laws of that state are advanced.

173. The traditional approach is exemplified in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 119-428 (1934). The myriad rules can be summarized as offering a few single-contact rules for selecting the jurisdiction whose law should apply. For instance, in contracts cases, courts using the *Restatement (First) of Conflict of Laws* would be called upon to apply the law of the place where the contract was made. *See id.*

174. *See* Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box?*, 18 ARIZ. J. INT'L & COMP. L. 867, 879-81 (2001) (providing a detailed history and summary of traditional conflicts laws).

175. This term is used in a section heading in the text of CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS *supra* note 169, at 38. The section, "Traditional Practice: A Survey of Escape Devices" addresses the various methods by which courts began to stray from the traditional rules in order to reach judicial outcomes that advanced the interests of justice and public policy.

eroded the traditional approaches to choice-of-law questions, so that the ultimate virtue of the strict rules—predictability—stood on shaky ground.[176] More importantly, Currie found that strict approaches often resulted in undesirable or perverse outcomes.[177] Strict rules may dictate application of one state's law to a case in which the state has no real interest, at the expense of another state whose interests in having its law apply are overwhelming.[178] Such perverse outcomes are clearly possible when courts analyze intrajurisdictional conflict-of-laws questions under the canons of construction: the application of strict rules in the case of the biplane would lead a court to apply the TRIA to enforce a plaintiff's judgment against property of relatively little value,[179] while simultaneously placing a critically important international treaty on shaky ground. In light of the legislative history and governmental interests driving both laws,[180] such an outcome is far from ideal.

Currie, focusing his attention on interstate choice-of-law questions, sought to avoid these perverse outcomes under the strict rules by proposing that courts determine whether application of the law to the instant case advances each state's legislative interests.[181] If both states' interests are promoted, then there is a "true conflict."[182] To resolve true conflicts, courts should reconsider the legislative purposes behind the conflicting laws and determine whether a "more moderate and restrained interpretation of the policy or interest of one state" would eradicate the

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See id. Other scholars have noted that the escape devices offer courts an opportunity to reach the desired outcome and then structure their analysis so that it would appear as though mechanical laws guided the decision. *See id.* at 47 (discussing R. LEFLAR, THE LAW OF CONFLICT OF LAWS 95 (1962) (describing various Arkansas cases in which the courts, called upon to apply traditional rules that hinge on whether the case is a tort or contract, apparently "chos[e] whichever characterization was necessary for the occasion")).

176. *See id.* at 47 (questioning whether the widespread use of escape devices will threaten uniformity and predictability).

177. Currie, *supra* note 171, at 242. For instance, one classic territorial rule used to resolve interstate choice-of-law questions declared that the law of the place where the contract was formed should govern the case. *Id.* at 245. However, Currie found that this rule produced desirable results in only six of fourteen hypothetical cases. *See id.* at 242. In four of these six cases, the states' interests do not conflict, and in the remaining two cases the forum state's interests are advanced, and the foreign state's interests are subjugated. *Id.*

178. *See id.*

179. *See supra* note 2 (estimating the biplane's probable economic value).

180. *See supra* Parts II-III (discussing the interests and purposes behind the Hague Convention, its predecessor treaties, the TRIA, and its predecessor statutes).

181. *See* Currie, *supra* note 171, at 242, 246.

182. *See id.* at 253. Currie also acknowledged that there may be "false conflicts," or cases in which only one state has a genuine interest in having its law apply. *See id.* at 252. In such cases, Currie's model instructs courts to apply the law of the only state with an interest. *Id.*

conflict.[183] The following section carefully considers the policies behind the two laws that clash in the case of the biplane.

A. *Policies Underlying the Conflicting Substantive Laws*

On the surface, both the Hague Convention and the TRIA are designed to deter global terrorism; the TRIA facilitates the enforcement of judgments against state sponsors of terrorism, while the Hague Convention establishes an international procedure for handling incidents of air piracy.[184] Yet the detailed histories of these laws, including relevant predecessor laws, reveal more distinct and potentially divergent legislative purposes. The Hague Convention reflects the global community's need to protect foreign ownership interests in aircraft forced to land in unfriendly territory.[185] To this end, the Hague Convention embodies an intent to remove civil aircraft from the political whim of participating nations and combat and deter air piracy by establishing a systematic and cooperative procedure for handling such incidents.[186] Applying the Hague Convention to the case of the biplane clearly advances the interests behind that agreement; the biplane is an "unlawfully seized" aircraft, and its owner will suffer a loss if the aircraft is not returned.[187]

The TRIA also represents important legislative goals. Congress passed the statute to enable plaintiffs to sue and collect judgments against nations that have caused death or injury to Americans.[188] Congress designed the TRIA, like its thwarted predecessors, to deter acts of terrorism and compensate American victims. As prior legislative attempts reveal, Congress also intended the law to target a virtually limitless range of assets.[189] The TRIA's goals are advanced when it is applied to the case of the biplane.[190] Martinez has suffered an injury and should be made whole.

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183. Brainerd Currie, *Comments on* Babcock v. Jackson, *A Recent Development in Conflicts of Laws*, 63 COLUM. L. REV. 1233, 1242 (1963).

184. *See supra* Parts II-III (discussing the interests, purposes, and histories of these two laws).

185. In the years following World War II, a growing civil aviation industry required that nations afford special treatment to commercial flights so that aviation, as well as all other commercial endeavors that rely on air travel, could develop independent of political sentiments. *See supra* Part II. These interests are reflected in the Chicago and Geneva Conventions, which should be used to interpret the language of the Hague Convention. The latter treaty's protection of the aircraft's "lawful owner," when considered in the context of the preceding treaties and the historical interests they reflect, clearly indicates that states should respect the lawful foreign owner, not a person lawfully entitled to possession and ownership as a result of domestic laws. *See id.*

186. *See id.*

187. Although the biplane is significantly less valuable than most aircraft, *see supra* note 2, international agreements depend on consistent and uniform application.

188. *See supra* Part III.

189. This argument is presented in *supra* note 151.

190. However, a court also could find that the goals of the TRIA are not advanced by

Although the biplane is of modest value,[191] it is socio-economically more efficient to enable Martinez to receive some rapid relief. Because the process of seizing an item of personal property is likely easier than that of lobbying the federal government to release blocked liquid assets,[192] the biplane is an efficient mode of compensation. Therefore, since the interests behind both laws are advanced when applied to the case of the biplane, a true conflict exists.

A more moderate or restrained reading of either law would not appear to resolve the conflict. The Hague Convention depends on consistent and uniform application, and the TRIA is rooted in a governmental intent to provide victims restitution, with almost no limits on the type of property plaintiffs may reach.

At this point in an *interstate* conflict, Currie would recommend that the court simply apply the law of the forum; Currie argues that it would be inappropriate for courts to balance the interests of two states in order to

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application to the case of the biplane. The goal of deterrence is not truly advanced since the biplane's worth is not financially significant to the Cuban government. Indeed, since the Cuban government did not suffer a significant financial loss, and since the entire episode imposed upon the biplane considerable symbolic value, the application of the TRIA can in fact lead to greater hostilities between the two nations and potentially invite future acts of terrorism. This symbolic value is reflected in President Fidel Castro's decision to stage a rally outside the American mission in Havana in response to the biplane's attachment. *See Cuba: Thousands Protest Against U.S.*, *supra* note 31. The United States has, at prior points in history, considered violations of international law as potential invitations for acts of aggression from other nations. *See* Edye v. Robertson, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." If enforcement by this method fails, the breach of the treaty "becomes the subject of international negotiations and reclamations, . . . which may in the end be enforced by actual war."); Bradley, *supra* note 121, at 492 (explaining that, in early American history, "[t]he possibility that breaches of international law could result in war . . . had been a significant concern during the drafting of the Constitution. Thus, . . . the U.S. government had a strong desire to avoid violations of international law" (footnotes omitted)). Additionally, the TRIA's goal of compensating American victims is not advanced by application of the TRIA to the case of the biplane—Martinez's judgment of $27.1 million is nowhere near fulfilled, nor is she likely to be made whole by the biplane. Therefore, although she obtained some recompense, she most likely will have to enforce her judgment against other assets. If a court adopted this position, the analysis would essentially end—the case would present a "false conflict," and the court would apply the Hague Convention to the case of the biplane.

191. *See supra* note 2.

192. *See* Jennifer Valdes, *Woman Takes on Castro: Cuban Agent Married Her, Then Left Her Alone in West Kendall*, S. FLA. SUN-SENTINEL, July 5, 2003, at 1A ("Obtaining access to the [blocked] money could be difficult, however, unless [Martinez and her attorneys] successfully lobby Congress and President Bush."). For some examples of the difficult questions that arise, see Martin Flumenbaum & Brad S. Karp, *Recovering Frozen Terrorist Assets; Attorney Work Product*, N.Y.L.J., Dec. 2, 2003, at 3; Leigh Jones, *Bomb Victim's Kin Cannot Tap Iranian Assets in City Bank*, N.Y.L.J., Feb. 5, 2004, at 1.

make a choice.[193] Clearly, courts cannot resolve intrajurisdictional conflict-of-laws questions through application of the forum law because both laws are laws of the forum. However, criticism of Currie's approach clearly demonstrates[194] that reliance on forum law to sidestep an inappropriate exercise of judicial power is unnecessary in this case. Using interest analysis to resolve an intrajurisdictional conflict of laws question does not implicate Currie's concerns about interstate relations. In fact, courts regularly weigh legislative interests within their own jurisdictions.[195] Therefore, when courts apply interest analysis in an intrajurisdictional context, Currie's "restrained" approach is unnecessary.

B. *A Fully "Unrestrained" Approach to Classic Interest Analysis?*

Since intrajurisdictional conflict of laws questions do not implicate Currie's concerns, courts could resolve clashes between two laws of the same sovereign simply by weighing competing interests in an unrestrained manner. As numerous cases demonstrate, courts often do this when they interpret and apply most laws created by the legislative body in their own jurisdictions.[196] However, the case of the biplane, and indeed any case that features a conflict between a statute and a treaty, raises other theoretical concerns that perhaps necessitate some restraint on judicial discretion.

In the case of the biplane, a balancing of interests would require courts to identify and advance interests that affect the sovereign's position internationally; the analysis would be artificial if courts simply gave mechanical deference to interests that occupy a domestic arena.[197] Thus,

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193. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 (1959) (explaining that any "assessment of the respective values of the competing legitimate interests of two sovereign states . . . is a political function of a very high order").

194. *See, e.g.*, Traynor, *supra* note 169, at 852-53 (asserting that courts often weigh competing interests to resolve intrajurisdictional conflicts of laws).

195. *See, e.g.*, Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983) (addressing a conflict between two laws of Congress, Federal Rule of Civil Procedure 69 and 42 U.S.C. § 1988, by evaluating the interests behind each).

196. *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (considering the interests and purposes behind two laws of the same jurisdiction, the intestacy statute on descent and distribution and the criminal laws regarding murder, and finding that "slayers" should not be permitted to inherit from the decedent-victim's estate).

197. For instance, a court that assumes a domestic frame of reference may find that it makes better socio-economic sense to enable Martinez to obtain some rapid relief, even though the biplane is of modest value. An American court certainly will be sensitive to the needs of an American plaintiff injured by a foreign state. Also, since the process of seizing an item of personal property is most likely easier than lobbying the federal government to release blocked liquid assets, the better law may indeed be the TRIA in this instance. However, a court also could assume a broader frame of reference, and find that an entire global civil aviation industry—including the American corporations that dominate the market—depends on the promises made by the parties to the Hague Convention. Given the importance of that industry to virtually all other business endeavors, it may

courts must be willing to adopt a domestic *and* international frame of reference. This simply is not the norm. Case law demonstrates that American courts tend to discount the needs of the global community when faced with conflicts between domestic and international laws,[198] so that an unrestrained interest balancing typically would result in adoption of the statute over the treaty.[199] Therefore, an unrestrained weighing of interests may not be the best approach in the case of the biplane.

C. *The Comparative Impairment Approach to Interest Analysis*

The comparative impairment approach to interest analysis, developed by Professor William Baxter,[200] provides a variation of Currie's model that may resolve the case of the biplane. This approach to interstate conflicts urges courts to apply the law of the state whose interests would suffer the most by application of another state's law.[201] In this manner, courts can further evaluate the competing interests and classify them in a more predictable fashion, without going so far as to permit unrestrained, normative weighing of interests.[202]

In the case of the biplane, application of the TRIA would significantly impair the goals of the Hague Convention. Since international agreements depend on consistent application by member states,[203] an alternative disposition, even in a single case, can render the entire agreement obsolete. Indeed, because international law is not governed by a single legislative body that can rewrite and amend laws as circumstances change,[204] treaties

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be more socio-economically sound to advance the Hague Convention at the expense of one person's right to collect under the TRIA. In reaching this determination, a court may consider the financial pressures that already have wreaked havoc on the airline industry as a result of September 11, as well as the domestic and international community's need for cooperation to combat hijackings.

198. This argument was advanced in Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1284-85 (1998). Zekoll cites the United States Supreme Court's ruling in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987), which applied the Federal Rules of Civil Procedure in a manner that violated the Hague Evidence Convention.

199. Zekoll, *supra* note 198, at 1284-85.

200. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 42 (1963-1964).

201. *See id.* at 9.

202. A court using comparative impairment weighs the extent of the impairment of laws and state interests, not the value or importance of the legislature's interest. *See id* at 5; *see also* Bernhard v. Harrah's Club, 546 P.2d 719, 720-21 (Cal. 1976) (applying comparative impairment, thereby adopting the model as the dominant choice-of-law theory to resolve interstate conflicts).

203. Zekoll, *supra* note 198, at 1284 (explaining that international agreements depend on consistent application but asserting that the United States has failed to recognize its obligations under international law on several occasions).

204. The *Restatement (Third) of the Foreign Relations Law of the U.S.* raises this point eloquently:

gain international force when member states consistently follow them.[205] Since the United States and Cuba, as well as other participating nations, always have followed the Hague Convention, it would be reasonable for the Cuban government to expect that the treaty would continue to govern acts of air piracy between the two nations.[206] Indeed, all parties to the Hague Convention have justified expectations[207] that the agreement will be upheld.[208] Since the agreement, like its predecessor treaties, is essentially a global contract designed to remove civil aircraft from the political whims of potentially unfriendly nations, signatory nations most likely expected that the special protections afforded to civil aircraft would apply regardless of future hostilities.[209] No party could have anticipated

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> There is no "world government" as the term "government" is commonly understood. There is no central legislature with general law-making authority; the General Assembly and other organs of the United Nations influence the development of international law but only when their product is accepted by states. There is no executive institution to enforce law; the United Nations Security Council has limited executive power to enforce the provisions of the Charter and to maintain international peace and security, but it has no authority to enforce international law generally . . . .

Introductory Note to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. (1987) (citation omitted).

205. *See supra* note 203.

206. *See supra* notes 11, 27.

207. Professor William Joseph Singer explained the role of the parties' "justified expectations" in a 1990 article:

> Interest analysis focuses initially on (1) the policies underlying conflicting substantive laws and on the persons or events toward which those policies are directed. It then supplements this factor with consideration of (2) the justified expectations of the parties who may have relied on the law of a particular state in planning their conduct or who would be unfairly surprised by the application of another state's law.

Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 733-34 (1990) (footnotes omitted). When considering the justified expectations of the parties, the analysis should discern whether application of either law would lead to "unfair surprise." *Id.* at 734 & n.11.

208. In fact, in international trade, contracting parties—including nations—often identify specific international agreements or international law more generally as the governing law in choice-of-law provisions. Fabrizio Marrella, *Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts*, 36 VAND. J. TRANSNAT'L L. 1137, 1142 (2003).

209. These expectations are reflected in the Chinese government's reaction to the overruling of a treaty:

> "[The court hearing the case] says that it can not inquire whether the reasons for this action are good or bad, because . . . the will of Congress must be obeyed,

that a subsequent State Department label identifying certain nations as "state sponsors of terrorism" would modify or nullify the Hague Convention.[210]

Declining to apply the TRIA to the case of the biplane, however, would not significantly impair the interests behind the statute. Since the TRIA explicitly permits the President to conduct an "asset-by-asset" determination,[211] the law's interests do not depend on attachment of property in every instance. If a plaintiff cannot execute his judgment against a certain asset, he is still free to pursue enforcement against other property.

Martinez's justified expectations do not change the outcome. Martinez certainly expected to enforce her judgment against property belonging to the Cuban government. The question, however, is whether her expectations were reasonable with regard to the biplane. First, since the law that enabled her to execute her judgment against a broader range of property was passed after she obtained her judgment,[212] and after the biplane's arrival in the United States,[213] it is questionable whether she had a reasonable expectation of ever collecting her judgment by enforcing it specifically against the biplane. Moreover, because the TRIA authorizes her to reach a wide range of property, and because other blocked Cuban assets are available,[214] her expectations do not hinge on her ability to take

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> though it is in plain violation of treaties. . . . In my country we have acted upon the conviction that where two nations deliberately and solemnly entered upon treaty stipulations they thereby formed a sacred compact from which they could not be honorably discharged except through friendly negotiations and a new agreement. I was, therefore, not prepared to learn through the medium of that great tribunal that there was a way recognized in the law and practice of this country whereby your Government could release itself from treaty obligations without consultation with or the consent of the other party to what we had been accustomed to regard as a sacred instrument."

Vagts, *supra* note 143, at 317-18 (alteration in original) (quoting Letter from Chang Yen Hoon, Minister Plenipotentiary of China, to James G. Blaine, U.S. Secretary of State (July 8, 1889), *in* 1890 FOREIGN RELATIONS OF THE UNITED STATES 132, 133).

210. *See supra* note 25.

211. *See supra* Part III.E (discussing the pertinent provisions of the TRIA).

212. Martinez's judgment was awarded in March 2001, *see supra* Part I, and the TRIA was passed in 2002. *See supra* Part III.E.

213. The TRIA actually was passed weeks after the biplane arrived. *See supra* Part I and note 24.

214. A 2002 newspaper article stated that there were approximately two hundred million dollars million in blocked Cuban assets in the United States, although ninety-six million dollars of this amount was about to be distributed to a group of plaintiffs. Roger Parloff, *Foreign Policy by Private Suit*, RECORDER, June 28, 2002, at 5.

a biplane possibly worth thirty to forty thousand dollars—a de minimis amount compared to her entire award.[215]

In summary, application of the comparative impairment approach to interest analysis favors application of the Hague Convention to the case of the biplane and forces the TRIA to yield to the treaty's provision in those narrow set of cases that involve unlawfully seized aircraft. This analysis produces a predictable outcome and allows courts to give careful consideration to legislative history, governmental interests, and the potential ramifications of each possible result. In this sense, the analysis is far more thorough than that performed under traditional canons of construction. Given the importance of domestic and international laws aimed at deterring international terrorism, a more vigilant analysis allows courts to identify the intersection of domestic and international interests and advance both interests simultaneously wherever possible. In addition, the resolution of conflicts between treaties and statutes is much more predictable under a comparative impairment approach. The careful consideration of interests and policies reduces the potential for the perverse outcomes that strict canons frequently permit.

VI. CONCLUSION: SUMMARY AND RECOMMENDATIONS

The canons of construction do not categorically resolve the case of the biplane, and ironically, the strict rules often conceal what is essentially unrestrained judicial discretion. While any form of concealed judicial decisionmaking should be troublesome,[216] in the case of the biplane we are left with the uneasy realization that courts can modify and even nullify American adherence to a multilateral treaty on a case-by-case basis through the application of a set of canons that afford little ability to predict potentially perverse outcomes. Admittedly, this tremendous range of judicial discretion turns what critics have called "plaintiff's diplomacy"[217] into what may in fact be "trial court's diplomacy."[218] While this obviously raises questions about the usefulness of the canons more generally, it certainly leads to the conclusion that where treaties and statutes conflict, a different resolution is necessary.

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215. On the biplane's possible value, see *supra* note 2.

216. Clandestine judicial reasoning is troublesome because the parties are not given the opportunity to bring forward arguments, case law, and public policy to aid the court's analysis. Rather, the parties bring forward arguments confined to a strict set of canons, and the court conducts its own review of legislative interests without giving the parties an opportunity to advise on the real decisionmaking of the court.

217. For a discussion of "plaintiff's diplomacy," see *supra* note 35.

218. By "trial court's diplomacy," I mean that judges may, under the rubric of a choice-of-law analysis, ultimately determine whether to uphold or overturn an important international agreement.

To solve the narrower dilemma addressed in this Note, a clear legislative solution may be the answer. An amendment to the statute should specifically exempt civil aircraft subject to the Hague Convention in the same manner that the current scheme exempts diplomatic and consular properties.[219] However, this resolution would not solve the broader problems of judicial discretion in intrajurisdictional conflict of laws questions and the opportunity for "trial court's diplomacy" when that conflict is between a treaty and a statute. In this broad sense, the case of the biplane is a profound legal quagmire that a legislative exemption would not resolve. Therefore, for the broader question of intrajurisdictional conflicts, the application of comparative impairment interest analysis can produce more predictable outcomes that take into account the myriad short- and long-term consequences of a court's choice between conflicting laws. Not only is it more desirable for courts to perform an overt interest analysis so that parties may introduce relevant legal and policy arguments, but the use of this approach may encourage courts to adopt more comprehensive perspectives.

Congressional interests do not stop at the nation's borders.[220] In today's global economy, and in a world still reeling from the tragic impacts of terrorism, the use of comparative impairment interest analysis may compel courts to recognize that choices between conflicting laws must be evaluated in a domestic and international sphere. Indeed, where conflicts between statutes and treaties are concerned, our national interest—in its very broadest sense—may depend on this awakening.

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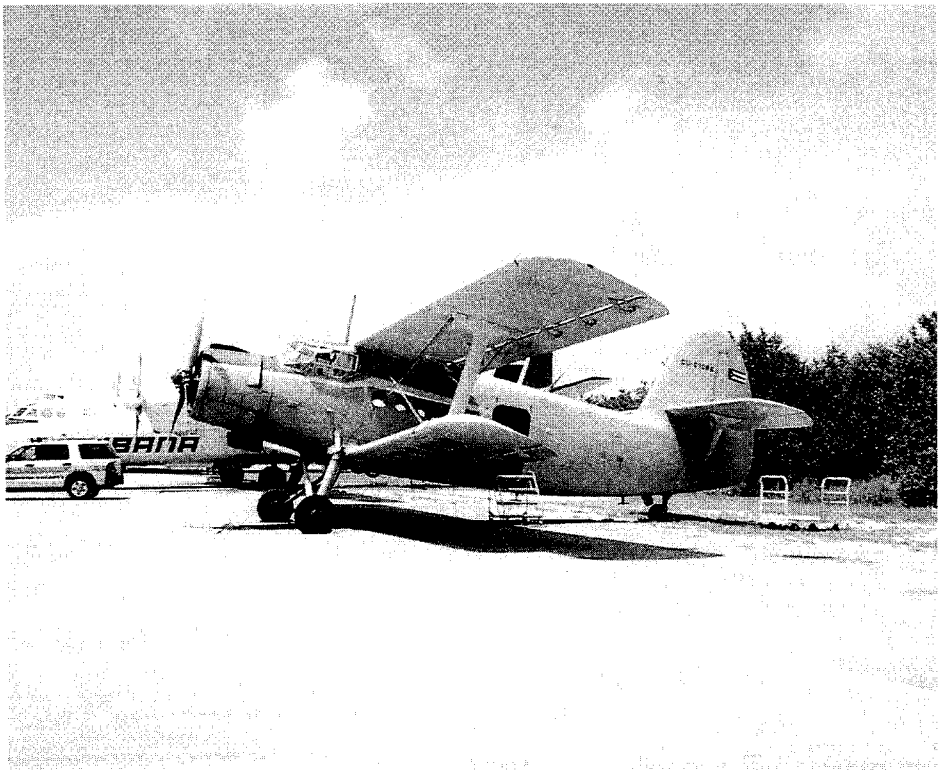
219. For a discussion of the exemption for diplomatic and consular property, see *supra* Part III.E. A presidential waiver could achieve the same ends, but since the TRIA requires the President to conduct an "asset-by-asset" determination, an aircraft of such little economic worth probably would not invite personalized executive scrutiny. *See supra* Part III.E (discussing the pertinent provisions of the TRIA).

220. Indeed, the American system of governance was premised on recognition that the nation has important interests that must be promoted or protected in the international sphere. Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 255-56 (1997) (noting that "thinkers like James Madison and Alexander Hamilton were embarrassed by the state of national affairs under the Articles of Confederation, particularly by the inability of America's diplomats to promote America's interests abroad") (citing PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814 (1993)).



The "Little Yellow Cuban Biplane" is shown above (center). This photograph was taken by the author in July 2003 at the Key West International Airport, minutes before an auction to sell two other Cuban aircraft commenced.