No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG,
Petitioner,

v.

CAROL P. SACHS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER IN ITS PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*

The Government of the Kingdom of the Netherlands ("the Government") is committed to the rule of law and to the basic principles of international law that impose restraints on the assertion of jurisdiction by one State over civil actions against foreign State-owned entities.[1]

The Government is extremely concerned about the broad exception to the basic principle of sovereign immunity that the Ninth Circuit Court of Appeals created when it held that:

> [a] foreign-state owned common carrier, such as a railway or an airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier.

Pet. App. at 4. On this basis, the Ninth Circuit held that the American purchaser of such a ticket could bring suit in the United States against the foreign state-owned carrier for any accident in the foreign country.

The Government sees this decision as a particularly egregious example of jurisdictional overreaching and therefore is concerned about allowing the decision to stay in place for even a short period of time.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus Curiae*, its members, and its counsel contributed monetarily to the preparation or submission of this brief. Counsel of Record for both Petitioner and Respondent received timely notice of *Amicus Curiae*'s intent to file this brief, and both Petitioner and Respondent have granted their consent to the filing of this brief.

The Government has consistently opposed broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States. Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute.

The Government remains deeply concerned about the continued failure by some U.S. courts to take account of the jurisdictional constraints under international law when construing domestic statutes, notwithstanding the Supreme Court's concerns with the exercise of expansive extraterritorial jurisdiction in such cases as *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) ("*Empagran*") and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel*"), cases in which the Government jointly participated as an *amicus curiae*.[2]

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[2] Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104; Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 U.S. S. Ct. Briefs LEXIS 519; and Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 U.S. S. Ct. Briefs LEXIS 2651.

This brief is intended to set out the views of a nation that has been historically concerned with the extra-territorial exercise of jurisdiction by the United States. It is purely intended to urge this Court to apply to the Foreign Sovereign Immunities Act ("FSIA") the same types of jurisdictional restraints recognized in international law that the Government has previously urged and this Court has accepted in such cases as *Empagran* and *Kiobel*.

SUMMARY OF THE ARGUMENT

The Government urges the Court to grant Certiorari on the following Question:

> Whether it would be consistent with international law for a U.S. court to construe the "commercial activity carried on in the United States" exception in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), to allow suit in the U.S. courts against a foreign state-owned railway for an injury that was suffered abroad, based solely on the purchase of a ticket from a U.S.-based internet seller that was not owned or controlled by the foreign state-owned entity.

This is a relatively simple case factually, which makes it an excellent vehicle for the Court to resolve the likely confusion generated by the Ninth Circuit's overly expansive approach to the "commercial activity carried on in the United States" exception contained in the FSIA, 28 U.S.C. § 1605(a)(2).

The plaintiff, Mrs. Carol Sachs, purchased on the internet a four-day Eurail pass from a Massachusetts-based business called Rail Pass Experts ("RPE"), and while using it to board a train operated by the Austrian state railway OBB Personenverkehr AG ("OBB"), she suffered a serious injury.

OBB had no corporate affiliation or agency agreement with RPE. Nevertheless, the en banc court in the Ninth Circuit held that: (i) OBB was engaged in "commercial activity carried on in the United States" solely as the result of RPE's sale of a Eurail pass to a person in the United States, Pet. App. at 32, and (ii) the plaintiff's injuries suffered in Austria were "based upon [this] commercial activity carried on in the United States". Pet. App. at 40. Both determinations stretch credibility to the limit.

In deciding the case, the Ninth Circuit completely ignored its own prior analysis. In *McKeel v. Islamic Republic of Iran*, the Court stated:

> [N]othing in the legislative history [of the FSIA] suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory. Such an intent would not be consistent with the prevailing practice in international law. That practice is that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state.

722 F.2d 582, 588 (9th Cir. 1983) (interpreting the FSIA in conformity with the European Convention on State Immunity and declining to allow plaintiffs to seek damages against Iran for acts which occurred at the U.S. Embassy in Tehran). The Ninth Circuit's 1983 analysis is correct and should have been applied here.

Accordingly, the Government respectfully urges this Court to grant Petitioner's Writ of Certiorari and reverse the Ninth Circuit decision.

ARGUMENT

I. THE FSIA REPRESENTS A CONGRESSIONAL EFFORT TO MINIMIZE JURISDICTIONAL UNCERTAINTY IN WAYS CONSISTENT WITH THE PRACTICES OF OTHER NATIONS

That serious inter-governmental difficulties may well be generated by disputes over sovereign immunity was well recognized by this Court in an important case concerning assets seized by Cuba in 1960 after the Castro-led revolution. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) ("*Dunhill*"). This case was decided a few months before the FSIA was enacted. The Court underscored the practical problems in this area, with respect to immunity from suit over seized property: "[t]he judicial seizure of the property of a friendly state may be regarded as [] an affront to its dignity . . . " *Id.* at 700 (citation omitted).

The Court explained that the historic policy of total blanket immunity for the actions of foreign sovereigns had been abandoned by the United States in 1952 in favor of the so-called "restrictive" policy on sovereign immunity because:

> this approach has been accepted by a large and increasing number of foreign states in the international community . . . . and . . . . subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts.

Dunhill, 425 U.S. at 702-704. The *Dunhill* case exposed the practical difficulties of applying sovereign

immunity and appears to be a reason that Congress enacted the FSIA the same year in order to codify and clarify what the Court had described.

The goal of bringing greater certainty and fairness to the "restrictive" sovereign immunity doctrine led to the enactment of the "based on a commercial activity carried on in the United States" proviso in Section 1605(a) that is at issue in the current case. 28 U.S.C. § 1605(a)(2). There is no indication in the statutory language or legislative history that Congress wished this proviso to create a sprawling exception to the general rule that foreign sovereigns are exempt from liability in the U.S. state and federal courts. Section 1603(e) of the Act simply provided a definition that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and *having substantial contact with the United States*." 28 U.S.C. § 1603(e) (emphasis added).

The political and diplomatic sensitivities discussed in *Dunhill* thus help explain why this Court has repeatedly emphasized that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("*Nelson*") (citation omitted).

II. THE NINTH CIRCUIT'S DECISION CREATES GREAT RISKS AND UNCERTAINTIES FOR FOREIGN STATE OWNED COMMON CARRIERS

The en banc court flatly held that ". . . the FSIA commercial-activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier's transportation system." Pet. App. at 41. This

is because, "[t]he sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States." Pet. App. at 32.

Thus, an U.S.-based internet seller of foreign transportation tickets (RPE) is treated as an integral part of "the foreign state" sufficient to trigger U.S. jurisdiction under the FSIA—even when, as here, there is no showing that the alleged agent is owned or controlled by the Austrian Government or its state-owned railway, or even has any direct contractual relationship with the Austrian parties. The Ninth Circuit used "traditional agency principles" and "[c]ommon sense", Pet. App. at 15 and 23, to reach a decision that utterly fails to appreciate the basic message of the FSIA—namely, a foreign sovereign is not "a traditional principal" in a commercial relationship. This is reflected in the statutory definition of "[a]n agency or instrumentality of a foreign state" in Section 1603(b). 28 U.S.C. § 1603(b). It explicitly excludes an entity which is "a citizen of a State of the United States"—which RPE is. Pet. App. at 5.

By thus ignoring the basic goals and provisions of the FSIA, the Ninth Circuit creates universal civil jurisdiction for U.S. courts against foreign governmental entities that goes well beyond what this Court would permit a U.S. tort victim to bring for a foreign injury against a foreign corporation under international law or the "due process" guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Ninth Circuit's erroneous decision could conceivably extend to situations where a foreign state-owned common carrier sells tickets directly from its

website to customers all over the world, but otherwise has no contacts with the United States. Surely, the mere purchase of a ticket from a website accessible in the United States cannot automatically give the U.S. courts global jurisdiction over any injury sustained abroad by a U.S. national while travelling on the ticket.

This is part of a familiar picture. Mrs. Sachs would prefer to sue OBB in a U.S. court. The unique attractiveness of the United States as a forum for international plaintiffs and plaintiffs' lawyers is well known to this Court, and can be traced to a series of decisions by the U.S. to accord private plaintiffs a set of advantages that most other countries have not accepted. Those advantages are very familiar. *Firstly*, the so-called "American rule" on litigation costs requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs; and the defendants' litigations costs are generally driven up by the broader discovery available to U.S. plaintiffs. *Secondly*, the constitutionally guaranteed right to a jury trial in civil damages cases is generally not available elsewhere. *Thirdly*, punitive damages are available in the United States, but generally are not allowed elsewhere.

This combination of advantages helps to explain why this Court continues to see plaintiffs' counsel make so many U.S. claims for faraway wrongs—including class action claims—based on expansive assertions of U.S. jurisdiction that this Court has found to be inconsistent with international law and comity. *See* Argument Part V below.

Because this Ninth Circuit decision directly concerns not only Austria, but many other sovereigns operating state-owned transportation systems which

serve American tourists, the Government respectfully urges this Court to restore the "commercial activities" proviso in the FSIA to its rightful, but geographically-limited place. Even if the *OBB* decision were rightly ignored in other circuits, it would still bind courts in states with approximately 19% of the American population; and it would also attract forum shopping expeditions from other circuits.

III. THE NINTH CIRCUIT DECISION, BEING SO CLEARLY INCONSISTENT WITH INTERNATIONAL LAW, IS ESPECIALLY LIKELY TO GENERATE JURISDICTIONAL CONFLICTS WITH FOREIGN SOVEREIGNS

Allowing Mrs. Sachs to bring suit in the United States just because she brought her foreign ticket from a U.S. travel agent fundamentally infringes the rights of the foreign state (in this case Austria) to provide judicial remedies against itself in its own courts under its own laws, just as the U.S. does with its U.S. Court of Claims.

It is a bedrock principle of international law that each sovereign Nation is equal and entitled to prescribe laws and to adjudicate claims regarding those persons within its sovereign territory. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.").

Similarly, principles of international law inform the interpretation of U.S. statutes. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an act of Congress ought never to

be construed to violate the law of nations if any other possible construction remains . . .").

Questions concerning sovereign immunity are particularly sensitive under international law. This is why a 2012 decision of the International Court of Justice has held that determinations of sovereign immunity should be made at the outset of the claim whenever possible, and not later in the case after extensive discovery.[3] The Court expressed concern that, in such cases, a claimant might somehow defeat sovereign immunity "simply by skilful construction of the claim."[4]

A. The Restatement of Foreign Relations Would Not Allow Extraterritorial Jurisdiction Over this Case

The conduct at issue here does not fall within any of the categories of extraterritorial jurisdiction recognized in the Third Restatement of Foreign Relations. Restat. (Third) of the Foreign Relations Law of the U.S. § 402 (1987).

First, the alleged acts of negligence by OBB have not had a "substantial effect" within the territory of the U.S. *Id.* § 402(1)(c). *See also Hartford Fire Insurance Co. v. Cal.*, 509 U.S. 764, 796 (1993) (upholding U.S. jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

Second, the "passive personality" principle, where jurisdiction is based on the nationality of the plaintiff

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[3] *See Jurisdictional Immunities of The State* (Germany v. Italy: Greece Intervening), 2012 I.C.J. 143, ¶ 82 (Feb. 3) *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

[4] *Id.*

only, "has not been generally accepted for ordinary torts. . . ." Restat. (Third) of the Foreign Relations Law of the U.S., § 402, cmt. g.

Third, the national security interests of the United States are not implicated by this case, and thus would not provide a basis for extraterritorial jurisdiction. *See id.*, § 402 (3).

Furthermore, this case would not satisfy the totality of factors that courts should consider when deciding whether the exercise of jurisdiction over "a person or activity having connections with another state" is reasonable or not. *Id.*, § 403.

To take the Ninth Circuit's defective logic in *OBB* to its full extreme, suppose that the famous Mrs. Palsgraf was an Austrian resident who had purchased her Long Island Railroad ticket in Austria. Fearing that she might lose in the New York courts, she brought suit in Austria and prevailed under some theory of absolute liability that was inconsistent with the negligence standard employed by Judge Cardozo in his landmark decision for the New York Court of Appeals. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (N.Y. 1928). Would U.S. courts recognize such a judgment based on such a tenuous jurisdictional link to Austria?

B. The Ninth Circuit's Decision is Plainly Inconsistent with the European Convention on State Immunity

This Court has previously looked to the European Convention on State Immunity when interpreting the scope of the FSIA, as have several Court of Appeals decisions. *See, e.g.*, *Republic of Aus. v. Altmann*, 541 U.S. 677, 708 (2004) (concurring opinion of Justices Breyer and Souter using the European Convention to

help interpret the FSIA).[5] This is an accepted practice because "Congress intended that the FSIA would make United States law on sovereign immunity consistent with international law", *McKeel v. Islamic Republic of Iran*, 722 F.2d at 587, and the European Convention was signed some four years before the FSIA was enacted. European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 182 (entered into force June 11, 1976).[6] Both the Government and Austria are parties to this Convention.[7]

Under that Convention, OBB would be entitled to sovereign immunity for the facts alleged in this case. Article 15 provides that states should be accorded immunity unless one of the enumerated exceptions applies. *Id*., art. 15.

The only two potentially relevant exceptions concern the place of injury and the defendant state's presence in the forum state. Thus Article 11 of the Convention provides:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury

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[5] *See also Bank of N.Y. v. Yugoimport*, No. 11-CV-1990, 2014 U.S. App. LEXIS 2454, at *27 (2d Cir. Feb. 10, 2014) (analyzing the European Convention on State Immunity to interpret the FSIA).

[6] *Available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm.

[7] European Convention on State Immunity, CETS No. 074, Treaty open for signature by the member States and for accession by non-member States, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG

> or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Id., art. 11. And Article 7(1) provides:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

Id., art. 7(1). This provision echoes in somewhat clearer language what is provided in Section 1605(a)(2). 28 U.S.C. § 1605(a)(2).

Thus a court in a state party to the European Convention could not assert the type of jurisdiction asserted by the faraway Ninth Circuit in this case. It would be appropriate for this Court to consider this reality in making a decision to hear and reverse the Ninth Circuit decision.[8]

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[8] Furthermore, the U.N. Convention on Jurisdictional Immunities of States and their Property, which has not yet entered into force, would also provide sovereign immunity under the facts of this case. U.N. Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/59/508 (Dec. 2, 2004), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/38&Lang=E. This Convention allows states to claim immunity against claims of personal injury unless the "act or omission occurred in whole or in part in the territory of [the forum] State and if the author of the act or omission was present in that territory at the time of the act or omission". *Id.*, art. 12.

IV. THE NINTH CIRCUIT'S DECISION IS A TROUBLESOME DEPARTURE FROM THIS COURT'S EARLIER FSIA DECISIONS

This Court has continued to recognize that the "based upon commercial activity carried on in the United States" proviso, 28 U.S.C. § 1605(a)(2), is a careful exception to the broad, historic rule that the activities of foreign sovereigns are generally exempt from judicial liability. Issues of "grace and comity" run through the whole sovereign immunity doctrine. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Court has looked very carefully at three related questions in past cases involving this proviso: (i) was the foreign government actually engaged in relevant "commercial activity"? (ii) if so, was this activity "carried on in the United States"? and (iii) was any foreign injury actually "based upon" some U.S. commercial activity by the defendant? If the answer to any of these questions is "no", then this Court has found that there is no FSIA jurisdiction in the United States. The Ninth Circuit's decision gave inappropriate "yes" answers to the second and third of these questions and thus produced a decision that is in fact entirely inconsistent with this Court's prior efforts.

A. Who Conducted the "Commercial Activity" that Actually Took Place in the United States?

In the *OBB* case, there is no doubt that OBB is engaged in the "commercial activity" of running trains in Austria. But is it also itself engaged in selling rail tickets in the United States? To answer this "yes", the Ninth Circuit had to treat the unaffiliated U.S.-based

ticket agent RPE as if it were an instrumentality of the Austrian state. Doing so runs clearly counter to this Court's careful discussion of the government-entity affiliation issue in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*").

The question in *Bancec* was whether a Cuban state-owned bank could be held responsible for a party's broader claims against the government for expropriation of its assets. In dealing with the affiliation issue, the Court observed that, "[d]uring its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Bancec*, 462 U.S. at 626-627 (citations omitted).[9] If a government-created entity is presumed to be separate from another part of the state, then surely it must be appropriate to treat that separate government entity as separate from some distant travel agent—rather than treating it is an instrumentality of the foreign state for FSIA purposes, as the Ninth Circuit has done.

The relationship between OBB and RPE does not come within sight of an "alter ego" relationship or even a strict "agency" standard. The OBB situation can be contrasted with the agency relationship at issue in another of the Court's careful FSIA decisions, *Nelson*. 507 U.S. 349 (1993). There the most relevant "commercial activity" was the recruitment, training

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[9] In *Bancec*, the Court was dealing with a situation where the District Court had found that, "Bancec is an alter ego of the Cuban Government", 462 U.S. at 618, and in these circumstances to allow it to escape liability, this Court said, "would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633.

and contract negotiated by the Hospital Corporation of America, as an agent for the defendant, a foreign government-owned hospital in Saudi Arabia. It was this contract that took the plaintiffs to Saudi Arabia, but this was not enough to establish liability for the injuries that they suffered later.

B. Was the Plaintiff's Injury "Based Upon" Whatever "Commercial Activity" was Found to Have Been Conducted in the United States?

The Court's *Nelson* decision is directly relevant on this crucial point. The plaintiffs were bringing tort claims about how they were mistreated and tortured by agents of the Saudi Government because one of them engaged in whistleblowing on safety violations by his government-hospital employer. The majority rejected the claim that these injuries were "based on" this commercial activity. Rather the majority defined "based upon" to cover "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357.

The *Nelson* plaintiffs' claims that jurisdiction could be "based upon" their original hiring was rejected because "those facts alone entitle the [plaintiffs] to nothing under their theory of the case"—which was necessarily based on torts rather than breaches of contract. *Id.* at 358. Moreover, "a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature." *Id*. at 361. In their concurrence, Justices White and Blackmun thought that deliberate retaliation for whistleblowing could be treated as a "commercial activity", but they concurred in the judgment because it was not "carried on in the United States." *Id.* at 364.

The same thing is essentially true in the present case. The plaintiff's claims are based on torts occurring in Austria, not breaches of a contract made in the United States. Indeed, the present case is even more extreme, since the plaintiff's claim is based on negligence, rather than deliberate acts by the defendant.

V. THE COURT SHOULD TAKE THIS OPPORTUNITY TO APPLY ITS OWN "DUE PROCESS" DECISIONS CONCERNING U.S. JURISDICTION OVER FOREIGN CORPORATIONS IN CONSTRUING THE "COMMERCIAL ACTIVITY" PROVISO IN THE FSIA

In *J.McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), this Court sent a strong general message which the Ninth Circuit apparently did not hear.

> "Due process protects the [foreign] defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Id. at 2785 (plurality opinion by Justice Kennedy) (citation omitted).

McIntyre concerned injuries caused in New Jersey by machinery that had been manufactured in the United Kingdom and shipped to an U.S. agent who sold four of them in New Jersey. In rejecting New Jersey's jurisdiction over the U.K.-based manufacturer, the Court said, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where

the defendant can be said to have targeted the forum; as a general rule it is not enough that the defendant might have predicted that its goods would reach the forum State." *Id.* at 2788. Jurisdiction was denied because the defendant lacked offices or employees or targeted promotional efforts in the forum. In his concurring opinion, Justice Breyer noted the new reality in which "a company targets the world by selling products from its Web site", but agreed that this should not justify the Court in departing from its traditional approach. *Id.* at 2792.

In the same Term, the Court addressed a related due process issue where the domestic plaintiff was making a negligence claim against a foreign corporation for injuries suffered abroad. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011) ("*Goodyear*"). Here the North Carolina plaintiffs sought to assert jurisdiction against the foreign subsidiary of a major U.S. corporation for a death and injuries caused in France based on allegedly defective tires manufactured in Turkey. This time a unanimous Court held (in an opinion by Justice Ginsburg) that sporadic sales of the foreign subsidiary's tires in North Carolina through intermediaries were "far short of the continuous and systematic general business contacts necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at 2857 (citation omitted).

McIntyre and Goodyear have since been applied by the District Court in Massachusetts to a set of facts almost identical to those at issue in the current *OBB* case. In *Weinberg v. Grand Circle Travel, LLC*, 891 F. Supp. 2d 228 (D. Mass. 2012), the Court rejected the

claim by U.S. residents that they could sue a foreign tour operator in tort for injuries suffered in Africa because they had bought their tour tickets in person from a Massachusetts-based travel agent. Judge Young made two findings that are equally applicable to the current case. First, "[the plaintiffs] have not provided any evidence to show that the [foreign tour operator] Defendants directly targeted Massachusetts residents. It appears that any contacts made were random, isolated, or fortuitous." *Id.* at 246 (citation omitted). Second, the plaintiffs' "advanced reservation agreement with [the domestic travel agent] would hardly be an important, or perhaps even material, element of proof in their negligence case". *Id.* at 245 (citation omitted). The same would be true here.

To summarize, in construing the FSIA, the Ninth Circuit has in effect embraced the "'sprawling view of general jurisdiction' [that this Court] rejected in *Goodyear*." *Daimler AG v. Bauman,* 134 S. Ct. 746, 760 (2014)("*Daimler*")(citation omitted). Under the principles articulated in *McIntyre* and *Goodyear*, and just reaffirmed in *Daimler*, Mrs. Sachs has to make a *general jurisdiction* claim against OBB, because her injuries flow not from the Eurail pass that she purchased in the United States, but from the accident that occurred in Austria; and OBB does not come close to having the kinds of contacts with California that could satisfy the "traditional notions of fair play and substantial justice" mandated by *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and its progeny.

VI. BASIC PRINCIPLES OF INTERNATIONAL DIPLOMACY AND COMITY ARE EVEN MORE IMPORTANT WHERE A FOREIGN SOVEREIGN IS THE DEFENDANT IN AN EXTRATERRITORIAL CASE

During the past decade, almost every member of this Court has written an opinion expressing concern about potential adverse effects when a state court or a federal court of appeals has proposed to exercise expansive U.S. jurisdiction over a foreign corporation for an alleged wrong that occurred abroad and had no significant effect within the United States. The Government respectfully urges that these concerns are doubly relevant in the current case.

This Term Justice Ginsburg, writing for seven other Justices in *Daimler*, made a general point that is equally applicable in the current case:

> The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.

Daimler, 134 S. Ct. at 763. Earlier in the opinion, Justice Ginsburg expressed concerns about what she called, "the Ninth Circuit's agency theory" as inappropriately subjecting "foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate . . ." *Id.* at 760.

In the *OBB* case, the Ninth Circuit has taken its "agency theory" of general jurisdiction a step further when a foreign government has an unaffiliated

U.S.-based entity selling a domestic resident a foreign ticket.

The Chief Justice's opinion in *Kiobel* reflected an analogous concern in explaining why the Court had decided there was no jurisdiction over the claims of a group of U.S. resident aliens for injuries that they had suffered abroad. "The presumption against extraterritoriality guards against our courts triggering such foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, 133 S. Ct. at 1669.

What the Ninth Circuit has done in its *OBB* decision is fundamentally at odds with this Court's emphasis that the "presumption against extraterritoriality" governs, unless Congress has so specified to the contrary. *See*, *e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010). Here in the FSIA, Congress has in fact given an explicit message that the Act's extraterritorial reach is limited to situations where a claim is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States". 28 U.S.C. § 1605(a)(2). But the conduct at issue here cannot be said to have had a "direct effect in the United States." Instead with its attenuated "agency" concept, the Court of Appeals has stood the FSIA on its head and in effect said OBB may be sued in the United States for injuries suffered while it ran commercial activities carried on in Austria.

VII. THE NINTH CIRCUIT'S EXPANSIVE APPROACH EXPOSES FOREIGN STATE-OWNED ENTITIES TO LARGE U.S. CLASS ACTIONS FOR ACTIVITIES ENTIRELY CARRIED ON ABROAD

The U.S. system of class actions has generated serious concerns among foreign enterprises, governments and lawyers because it is seen as involving large and expensive lawsuits, some of which appear to have been opportunistic. What makes the U.S. system such a source of concern is the apparently unique way it combines (i) opt-out class actions (which produce much larger aggregations of plaintiff claims), with (ii) the so-called "American rule" on litigation costs (which relieves the plaintiffs and class counsel of any obligation to pay defendants' costs of successfully defending a claim). Thus, as the European Commission considered the important subject of providing collective redress for consumers and other multiple victims, there is a recurring chorus about the need to avoid the abuses of the U.S. system.[10] This concern has led the Commission to recommend opt-in (or representative) collective actions, while emphasizing that "funding mechanisms available for collective actions should not create incentives for abusive litigation".[11] The 'opt-in' model has been adopted by most Member States, while an opt-out system has been adopted in the

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[10] *See Towards a European Horizontal Framework for Collective Redress,* at 8, COM (2013) 401 final (June 11, 2013), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0401&from=en (stating that "'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation").

[11] *Id.* at 15.

Netherlands for collective settlements and in a few other Member States for collective actions,[12] but always coupled with "loser pays" cost rules that are the norm in non-U.S. jurisdictions.[13]

As this Court well knows, U.S. class actions are based on the same jurisdictional rules as individual cases; and a majority of the recent cases where this Court has had to reverse unwarranted findings of extraterritorial U.S. jurisdiction have been brought by class action lawyers. *See*, *e.g.*, *Empagran*, 542 U.S. 155, *Morrison*, 130 S. Ct. 2869, *Kiobel*, 133 S.Ct. 1659 and *Daimler*, 134 S. Ct. 746.

Thus, the Government is concerned that the Ninth Circuit *OBB* decision, if left standing, will encourage and facilitate expensive class actions against foreign state-owned common carriers serving U.S. visitors.

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[12] Portugal and Bulgaria and as well as in Denmark for clearly defined consumer cases brought as representative actions.

[13] Bureau Européen des Unions de Consommateurs (The European Consumer Organization), *Litigation funding in relation to the establishment of a European mechanism of collective redress*, Section IV (Feb. 12, 2012) *available at* http://www.beuc.eu/publications/2012-00074-01-e.pdf

CONCLUSION

For the foregoing reasons, the Government respectfully urges this Court to grant Petitioner's Writ of Certiorari and reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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