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# THE ELUSIVE EXERCISE OF JURISDICTION OVER AIR TRANSPORTATION BETWEEN THE UNITED STATES AND SOUTH KOREA

Dana L. Christensen<sup>†</sup>

*Abstract:* Contrary to the decision reached by the Court of Appeals for the Second Circuit in *Chubb & Son, Inc. v. Asiana Airlines*, the federal courts should be permitted to exercise subject matter jurisdiction over the international transportation of goods by air between South Korea and the United States. Applying general principles of treaty interpretation under customary international law confirms that treaty relations under the Warsaw Convention exist between the two countries by way of the United States' adherence to that treaty, and South Korea's adherence to the Hague Protocol. Since federal courts have jurisdiction over cases arising under U.S. treaties, the district court was vested with treaty jurisdiction and the case should have been decided according to the terms of the Warsaw Convention. Furthermore, even in the absence of actual treaty relations, the question as to whether or not treaty relations existed was sufficient to support federal question jurisdiction. As a result, the court had discretion to rule on related claims, even after the dismissal of the treaty claim.

*We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.*

*U.S. Supreme Court in The Amiable Isabella*<sup>1</sup>

## I. INTRODUCTION

In *Chubb & Son, Inc. v. Asiana Airlines*,<sup>2</sup> a case concerning the application of the Warsaw Convention<sup>3</sup> to international air transportation between South Korea<sup>4</sup> and the United States, the Court of Appeals for the

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<sup>1</sup> *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (construing the treaty between the United States and Spain of 1795).

<sup>2</sup> *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000).

<sup>3</sup> The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* note following 49 U.S.C. § 40105 (1994) [hereinafter Warsaw Convention]. This treaty governs "international carriage of persons, luggage or goods performed by aircraft for reward." *Id.* art. 1, para. 1. See discussion *infra* Part III.A.

<sup>4</sup> The Republic of Korea is commonly known as South Korea. See BUREAU OF EAST ASIAN AND PAC. AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTES: KOREA, at [http://www.state.gov/www/background\\_notes/southkorea\\_0006\\_bgn.html](http://www.state.gov/www/background_notes/southkorea_0006_bgn.html) (Oct. 2000).

Second Circuit held that because the two countries adhered to different versions of the treaty they had no relevant treaty relationship and therefore, the district court lacked subject matter jurisdiction over the controversy.<sup>5</sup> Specifically, the court of appeals held that because South Korea adhered only to the Hague Protocol,<sup>6</sup> an amending agreement, and the United States adhered only to the original Warsaw Convention, treaty relations had not been created between the two countries. This holding rendered the air carrier liability limitation provisions of the Warsaw Convention<sup>7</sup> inapplicable in the *Chubb* case.

The court of appeals' holding was unexpected in light of the fact that other courts, including the U.S. Supreme Court, had decided earlier cases on the grounds that a Warsaw Convention treaty relationship existed between the United States and South Korea.<sup>8</sup> Furthermore, the Second Circuit's reasoning further deteriorates the Warsaw Convention's goal of uniformity in international aviation law, as the parties to the Warsaw Convention and its various amending agreements split into ever smaller factions by adhering to different combinations of agreements. Moreover, the implications of the *Chubb* holding reach far beyond the application of the Warsaw Convention—potentially affecting the application of any multilateral treaty that has been amended.

Because of the high probability of raising political issues, questions regarding the jurisdiction of federal courts are particularly important in the international context. Thus, the U.S. Constitution deliberately places disputes regarding U.S. treaties and international law under the jurisdiction of the federal courts.<sup>9</sup> Notwithstanding this constitutional directive, and contrary to existing precedent, the court of appeals found that a substantial, nonfrivolous allegation of a claim under a valid U.S. treaty did not establish federal question subject matter jurisdiction. This holding would discourage plaintiffs from bringing legitimate claims based on U.S. treaties or international law in a federal forum. As a result, plaintiffs will be induced to bring cases that will determine the future boundaries of international law in state court rather than in federal court.

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<sup>5</sup> *Chubb*, 214 F.3d at 314.

<sup>6</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. See discussion *infra* Part III.B.

<sup>7</sup> In most cases of passenger injury or death, or damage to or loss of cargo, the Warsaw Convention limits the air carriers' liability for accidental injury or death, and damaged or lost baggage or cargo. Warsaw Convention, *supra* note 3, arts. 17-30. See discussion *infra* Part III.A.

<sup>8</sup> See *infra* notes 152-155 and accompanying text.

<sup>9</sup> See U.S. CONST. art. III, § 2, cl. 1; see also discussion *infra* Part IV.B.

This Comment examines *Chubb* and concludes that, contrary to the Second Circuit's decision, treaty relations do exist between two countries where one has signed only the Hague Protocol and the other has signed only the Warsaw Convention. Part II summarizes *Chubb & Son, Inc. v. Asiana Airlines*. Part III describes relevant portions of the Warsaw Convention and the Hague Protocol. Part IV.A analyzes the *Chubb* decision in light of the Hague Protocol and general principles of treaty interpretation, and concludes that the Second Circuit incorrectly decided the question regarding treaty relations between the United States and South Korea. Part IV.B analyzes the *Chubb* decision in light of U.S. jurisdictional law, and concludes that the Second Circuit incorrectly decided the *Chubb* case regarding federal question subject matter jurisdiction in the absence of a treaty relationship.

## II. *CHUBB & SON, INC. v. ASIANA AIRLINES*

On August 4, 1995, Samsung Electronics Co., Ltd.<sup>10</sup> delivered seventeen parcels of computer chips to Asiana Airlines ("Asiana")<sup>11</sup> for shipment from Seoul to Samsung Semiconductor, Inc.<sup>12</sup> in San Jose, California.<sup>13</sup> The Asiana air waybill provided for shipment on a nonstop flight from Seoul to San Francisco,<sup>14</sup> but due to an excess of goods to be shipped, Asiana instead transported the parcels on a flight to Los Angeles.<sup>15</sup> The parcels were then trucked to San Francisco.<sup>16</sup> Two of the seventeen parcels, weighing 35.3 kg (less than seventy-eight pounds) and valued at \$583,000, were missing upon arrival at San Francisco.<sup>17</sup>

Samsung Semiconductor's insurer, Chubb & Son, Inc. ("Chubb"),<sup>18</sup> reimbursed Samsung Semiconductor according to the cargo insurance policy

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<sup>10</sup> A South Korean corporation. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 303 (2d Cir. 2000).

<sup>11</sup> A South Korean corporation. *Id.*

<sup>12</sup> A California corporation (subsidiary of the Samsung Group, South Korea). CAL. SECRETARY OF STATE, CORP. REC., available at LEXIS, CA Secretary of State Corporation Information file.

<sup>13</sup> Pl.'s Compl. at 2, *Chubb & Son, Inc. v. Asiana Airlines*, 1997 WL 1040543 (S.D.N.Y. June 17, 1997) (No. 96 Civ. 5082).

<sup>14</sup> Aff. for Pl. in Supp. of Partial Summ. J., Ex. A, *Chubb & Son, Inc. v. Asiana Airlines*, 1997 WL 1040543 (S.D.N.Y. June 17, 1997) (No. 96 Civ. 5082).

<sup>15</sup> *Chubb*, 214 F.3d at 303.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 304.

<sup>18</sup> A New York corporation. N.Y. DEP'T OF STATE, CORP. REC., available at LEXIS, NY Department of State Corporation and Limited Partnership Information file.

it had issued.<sup>19</sup> Chubb, as subrogee of Samsung Semiconductor, initiated a lawsuit in federal district court seeking recovery of its claim payment.<sup>20</sup>

Chubb claimed federal question subject matter jurisdiction<sup>21</sup> under 28 U.S.C. § 1331.<sup>22</sup> Asiana argued that the Warsaw Convention limited its liability.<sup>23</sup> Although the United States adhered only to the original Warsaw Convention<sup>24</sup> and South Korea adhered only to the Hague Protocol<sup>25</sup> at the time of the 1995 Samsung shipment, both parties initially agreed that the Warsaw Convention governed the dispute.<sup>26</sup>

The district court determined that only those portions of the Warsaw Convention to which both parties had agreed should apply to the case.<sup>27</sup> Thus, only the unamended sections of the treaty were applicable.<sup>28</sup> Under this theory, the district court held that the Warsaw Convention limited Asiana's liability to \$706.<sup>29</sup>

The Second Circuit reversed the district court's decision, holding that "the actions of the United States and South Korea did not create treaty relations with regard to the international carriage of goods by air . . . ."<sup>30</sup> The court reasoned that the original Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol were two separate treaties.<sup>31</sup>

<sup>19</sup> Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 304 (2d Cir. 2000).

<sup>20</sup> *Id.*

<sup>21</sup> Pl.'s Compl. at 1-2, Chubb & Son, Inc. v. Asiana Airlines, 1997 WL 1040543 (S.D.N.Y. June 17, 1997) (No. 96 Civ. 5082).

<sup>22</sup> 28 U.S.C. § 1331 (1994).

<sup>23</sup> Chubb, 214 F.3d at 304.

<sup>24</sup> See discussion *infra* Part III.A.

<sup>25</sup> See discussion *infra* Part III.B.

<sup>26</sup> Chubb & Son, Inc. v. Asiana Airlines, No. 96 Civ. 5082, 1997 WL 1040543, at \*3 (S.D.N.Y. June 17, 1997). Thus, in a Report and Recommendation to the district court, Magistrate J. Peck applied the original version of the Warsaw Convention to determine that the treaty's liability limits for the loss of goods, Warsaw Convention, *supra* note 3, art. 22(2), should not be available to Asiana Airlines because the air waybill did not conform to the Warsaw Convention's requirement that 'stopping places' en route be specified. *Id.* arts. 8(c), 9. Chubb, 1997 WL 1040543, at \*6. See *infra* notes 38-41 and accompanying text.

<sup>27</sup> See Chubb & Son, Inc. v. Asiana Airlines, No. 96 Civ. 5082, 1998 WL 647185, at \*4, \*6 (S.D.N.Y. Sept. 22, 1998).

<sup>28</sup> *Id.* at \*6.

<sup>29</sup> *Id.* at \*7. District Judge Preska found that the 'stopping places' requirement, Warsaw Convention, *supra* note 3, art. 8(c), did not form part of the treaty agreement between the United States and South Korea, because Article 8(c) had been deleted by the Hague Protocol. Chubb, 1998 WL 647185, at \*6. With the Article 8(c) bar to the liability limitation removed, and since the section of the treaty which gave rise to the cause of action, Warsaw Convention, *supra* note 3, art. 18, had not been amended, and the liability limit for lost or damaged cargo, *id.* art. 22(2), remained unchanged (even though the paragraph had been reworded), the district court held that Asiana's liability was limited by the "hybrid" treaty formed by the common portions of the two versions. Chubb, 1998 WL 647185, at \*7. See *infra* notes 39 and 51 and accompanying text.

<sup>30</sup> Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 314 (2d Cir. 2000).

<sup>31</sup> See *id.* at 310.

Thus, the two countries' actions were independent and unrelated, and did not result in any formal agreement.<sup>32</sup> The court of appeals went on to hold that because "the United States and South Korea [were] not in treaty relations with regard to the international carriage of goods by air, th[e] dispute d[id] not arise under a treaty of the United States and the district court [was] thereby deprived of subject matter jurisdiction."<sup>33</sup>

### III. AN OVERVIEW OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL

#### A. *The Warsaw Convention*

The international community negotiated the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Signed at Warsaw on 12 October 1929 ("Warsaw Convention")<sup>34</sup> in an effort to unify international law governing air transportation.<sup>35</sup> The Warsaw Convention is one of the oldest treaties creating uniform rules for a specific area of private law.<sup>36</sup>

The Warsaw Convention sought, in part, to establish and to place limitations upon air carriers' liability for personal injury or death and loss or damage to property.<sup>37</sup> Article 18 provides that a carrier shall be presumed liable for damages sustained in the event of loss of goods.<sup>38</sup> Article 22 provides the liability limitations.<sup>39</sup> Article 9 requires that certain

<sup>32</sup> See *id.* at 310-14. The court of appeals rejected the district court's creation of a "hybrid" treaty because it amounted to the court's rewriting of the treaty, which violates separation of powers. *Id.* at 312. Thus, the court reasoned that neither the original Warsaw Convention, nor the Hague Protocol, nor any part or combination of the two created any treaty relationship between the United States and South Korea. *Id.* at 310-14.

<sup>33</sup> *Id.* at 314. While the court did not discuss how the treaty question regarding transport of goods may differ from the treaty question regarding the transport of passengers, the court was careful to specify "the international carriage of goods," leaving the door open for such an argument on appeal or in a future case. *Id.*

<sup>34</sup> Warsaw Convention, *supra* note 3.

<sup>35</sup> OPPENHEIM'S INTERNATIONAL LAW 484, 659, (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); LAWRENCE B. GOLDBIRSCHE, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 5 (1988).

<sup>36</sup> GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 2 (1977).

<sup>37</sup> OPPENHEIM, *supra* note 35, at 659. The limitations on liability were intended to improve the insurability of the then fledgling air carriers. GOLDBIRSCHE, *supra* note 35, at 5.

<sup>38</sup> Warsaw Convention, *supra* note 3, art. 18.

<sup>39</sup> The original treaty allowed 125,000 francs, *id.* art. 22(1), (about \$8300 in U.S. courts, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 306 (2d Cir. 2000)) for passenger injury or death, and 250 francs per kilogram, Warsaw Convention, *supra* note 3, art. 22(2), (\$20 per kilogram in U.S. courts, Chubb, 214 F.3d at 306) for lost or damaged goods. In addition, carriers and passengers may enter into a 'special

“particulars” listed in Article 8 be included on the air waybill in order for the carrier to avail itself of the liability limitation on the transportation of goods.<sup>40</sup> Of particular relevance to the *Chubb* dispute, Article 8(c) requires that any “agreed stopping places” en route be specified on the air waybill.<sup>41</sup>

Jurisdiction under the Warsaw Convention is determined under Article 1, which provides in relevant part:

1. This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

2. For the purposes of this Convention the expression “international transportation” shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to . . . another power, even though that power is not a party to this convention.<sup>42</sup>

Thus, in order for jurisdiction under the treaty to attach, both the country of departure and the country of destination must be parties to the treaty, or the transportation must be a round trip originating in a country that is a party to the treaty with a stopover in another country.<sup>43</sup>

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contract,’ or shippers may make a ‘special declaration’ of the value and pay a supplementary sum to increase the carriers’ liability limits. Warsaw Convention, *supra* note 3, arts. 22(1)-(2).

<sup>40</sup> Warsaw Convention, *supra* note 3, art. 9 (“[I]f the air consignment note does not contain all the particulars set out in Article 8(a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.”).

<sup>41</sup> *Id.* art. 8(c). Article 8 states, in relevant part: “The air consignment note shall contain the following particulars: . . . (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity . . .” *Id.* arts. 8(b), 8(c). The Second Circuit has rigidly applied this rule, denying limited liability because of the omission of this particular. *See* *Mar. Ins. Co. v. Emery Air Freight Corp.*, 983 F.2d 437 (2d Cir. 1993); *see also infra* note 196 and accompanying text.

<sup>42</sup> Warsaw Convention, *supra* note 3, art. 1. The Article 8(c) *stopping places* requirement was included to give notice of this second classification of international carriage. G. Nathan Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. AIR L. 253, 258-59 (1956).

<sup>43</sup> It is noteworthy that the citizenship or residence of the airline (and that of passengers, when applicable) has no bearing on jurisdiction under the Warsaw Convention. GOLDHIRSCH, *supra* note 35, at 10.

The Warsaw Convention entered into force for the United States on October 29, 1934.<sup>44</sup> In the context of severe economic depression, the treaty was seen as allowing passengers and shippers some degree of relief while protecting fledgling air carriers from excessive liability.<sup>45</sup> The Warsaw Convention allowed for a maximum compensation of \$8300 for passenger injury or death, and \$20 per kilogram of lost or damaged goods.<sup>46</sup> The United States, as well as other countries, soon became disillusioned with the low wrongful death liability limit of the Warsaw Convention.<sup>47</sup>

### B. *The Hague Protocol*

In response to concerns regarding the inadequacy of the wrongful death liability limitation,<sup>48</sup> the international community negotiated the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air ("Hague Protocol"),<sup>49</sup> doubling the maximum compensation for wrongful death.<sup>50</sup> However, the liability limit for lost or damaged goods in Article 22(2) remained unchanged: although Article XI of the Hague Protocol reworded the original Article 22(2), it expressly incorporated the \$20 per kilogram limitation.<sup>51</sup> In addition, the Hague Protocol amended Article 8 to require the inclusion of "agreed stopping places" on the air waybill only when the places of departure and destination are both in the same country.<sup>52</sup> Finally, although reworded, the jurisdiction requirements of Article 1 remained substantively unchanged.<sup>53</sup>

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<sup>44</sup> U.S. DEP'T OF STATE, TREATIES IN FORCE 344 (2000).

<sup>45</sup> GOLDBIRSCHE, *supra* note 35, at 5.

<sup>46</sup> *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 306 (2d Cir. 2000); *see supra* note 39.

<sup>47</sup> *See* MILLER, *supra* note 36, at 37; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 502-04 (1967).

<sup>48</sup> *See* MILLER, *supra* note 36, at 37; GOLDBIRSCHE, *supra* note 35, at 96.

<sup>49</sup> Hague Protocol, *supra* note 6.

<sup>50</sup> *Id.* art. XI (raising the liability limit for wrongful death to 250,000 francs). The equivalent amount in dollars is \$16,600. *Chubb*, 214 F.3d at 306.

<sup>51</sup> Hague Protocol, *supra* note 6, art. XI. *See supra* notes 39 and 46 and accompanying text.

<sup>52</sup> Hague Protocol, *supra* note 6, art. VI. Most of the "particulars" required by Article 8 of the Warsaw Convention were eliminated and a new requirement was added that the air waybill

contain . . . a notice . . . to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and . . . in most cases limits the liability of carriers. . . .

*Id.* Furthermore, Article 9 was amended to deny the liability limits only if an air waybill is not made out, or if it "does not include the notice required by Article 8. . . ." *Id.* art. VII. Thus, under the Hague Protocol, the liability limitation for the loss of goods would be applicable in *Chubb*.

<sup>53</sup> Compare Hague Protocol, *supra* note 6, art. 1 with Warsaw Convention, *supra* note 3, art. 1.



As its title implies, the Hague Protocol took the form of a list of revisions to the Warsaw Convention. The Hague Protocol did not recite the text of unamended Warsaw Convention articles, nor even the full text of the amended articles.<sup>54</sup> Instead, the Hague Protocol comprised only the text of the individual paragraphs that were amended. It was thus required that “the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*.”<sup>55</sup> The Hague Protocol explicitly specified that “[r]atification of . . . [or] . . . [a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the [Warsaw] Convention as amended by [the Hague] Protocol.”<sup>56</sup>

The Hague Protocol entered into force for South Korea on October 11, 1967.<sup>57</sup> South Korea had not participated in the negotiation of the original Warsaw Convention,<sup>58</sup> and did not separately adhere to it.<sup>59</sup> The majority of the parties to the Warsaw Convention ratified the Hague Protocol.<sup>60</sup> In contrast, because of continued dissatisfaction with the low wrongful death liability limit,<sup>61</sup> the United States chose not to adhere to the Hague Protocol.<sup>62</sup>

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<sup>54</sup> See generally Hague Protocol, *supra* note 6.

<sup>55</sup> Hague Protocol, *supra* note 6, art. XIX (emphasis in original).

<sup>56</sup> *Id.* art. XXI, para. 2, art. XXIII, para. 2.

<sup>57</sup> GOLDBIRSCHE, *supra* note 35, at 287.

<sup>58</sup> The Republic of Korea did not gain its independence until September 9, 1948, nearly twenty years after the negotiation of the Warsaw Convention. BUREAU OF EAST ASIAN AND PAC. AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTES: KOREA, at [http://www.state.gov/www/background\\_notes/southkorea\\_0006\\_bgn.html](http://www.state.gov/www/background_notes/southkorea_0006_bgn.html) (June 2000).

<sup>59</sup> As of May 1988, seven countries adhered to the Hague Protocol but not to the original Warsaw Convention: El Salvador (Sept. 17, 1956), Guatemala (July 17, 1971), Malawi (June 9, 1971), Monaco (Apr. 9, 1979), Republic of Korea (July 13 1967), Singapore (Nov. 6, 1967), and Swaziland (July 20, 1971). See GOLDBIRSCHE, *supra* note 35, at 285-88.

<sup>60</sup> As of May 1988, ninety-six countries adhered to both the Warsaw Convention and the Hague Protocol. See GOLDBIRSCHE, *supra* note 35, at 285-88.

<sup>61</sup> René H. Mankiewicz, *Hague Protocol to Amend the Warsaw Convention*, 5 AM. J. COMP. L. 78, 80-81 (1955); GOLDBIRSCHE, *supra* note 35, at 96.

<sup>62</sup> See U.S. DEP'T OF STATE, TREATIES IN FORCE 344 (2000); MILLER, *supra* note 36, at 37. On September 28, 1998 the United States ratified *Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* (“Montreal Protocol No. 4”) (which was signed in 1975, J.C. Batra, *Modernization of the Warsaw System—Montreal 1999*, 65 J. AIR L. & COM. 429, 432 (2000)), and thereby acceded to the Warsaw Convention as amended by the Hague Protocol and as amended by Montreal Protocol No. 4. *Chubb & Son Inc. v. Asiana Airlines*, 214 F.3d 301, 307 n.4 (2d Cir. 2000). Nevertheless, by extension of the Second Circuit’s reasoning, that action still did not create treaty relations between the United States and any country that adheres only to the Hague Protocol, for the same reasons that the court found that South Korea is not bound by the original Warsaw Convention. Rather, the United States is in treaty relations with countries that adhere to the original Warsaw Convention, or to Montreal Protocol No. 4, or both, but not with countries that adhere solely to the Hague Protocol, since the United States never consented to the amendments of the Hague Protocol without

#### IV. THE COURT OF APPEALS INCORRECTLY DECIDED *CHUBB* BECAUSE TREATY RELATIONS EXISTED BETWEEN SOUTH KOREA AND THE UNITED STATES

Having determined that the Warsaw Convention did not apply to the international transportation of goods by air between South Korea and the United States, and without so much as discussing the law regarding subject matter jurisdiction, the court of appeals summarily concluded that the district court did not have subject matter jurisdiction.<sup>63</sup> This Comment refutes both of the court's determinations: first, that there was no treaty relationship between the two countries, and second, that a lack of treaty relations would deprive the court of federal question subject matter jurisdiction.

Instead, this Comment contends first, that South Korea's adherence to the Hague Protocol created treaty relations not only with parties to the amending agreement, but also with respect to parties to the original treaty. Second, it maintains that even in the absence of treaty relations between the two countries, the question of whether or not treaty relations existed under the circumstances in *Chubb* presented a federal question sufficient to confer discretion upon the lower federal courts to adjudicate any related claims.

##### A. *South Korea's Adherence to the Hague Protocol Created Treaty Relations Between South Korea and the United States*

Customary international law and general principles of treaty interpretation indicate that by way of adherence to the Hague Protocol, South Korea became a party to the original Warsaw Convention with respect to states which, like the United States, adhere only to the original treaty. Significantly, the subsequent practice of the two countries demonstrates that they intended to have a treaty relationship under the Warsaw Convention. In addition, most scholars agree that adherence to the Hague Protocol creates treaty relations with states that adhere only to the original Warsaw Convention. Finally, policy considerations compel recognition of treaty relations between states that are parties solely to the Hague Protocol and states that are parties solely to the Warsaw Convention.

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the provisions of Montreal Protocol No. 4. In addition, by the court of appeals' reasoning the United States is bound by the terms of the original Warsaw Convention with respect to countries that adhere to both that treaty and the Hague Protocol but not to Montreal Protocol No. 4.

<sup>63</sup> *Chubb*, 214 F.3d at 314.

### 1. *Overview of the Relevant International Law of Treaties*

Whether or not a treaty relationship existed between South Korea and the United States at the time of the shipment in *Chubb* depends on the effect of South Korea's adherence to the Hague Protocol with respect to countries that were parties solely to the original Warsaw Convention.<sup>64</sup> In order to answer this question the court must interpret international law, since "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."<sup>65</sup>

The Statute of the International Court of Justice,<sup>66</sup> which is generally accepted as authoritatively enunciating the sources of international law,<sup>67</sup> summarizes the sources of international law as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom,<sup>68</sup> as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59,<sup>69</sup> judicial decisions and the teachings of the most highly qualified publicists of the various nations, as

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<sup>64</sup> See MILLER, *supra* note 36, at 38.

<sup>65</sup> The Paquete Habana, 175 U.S. 677, 700 (1900).

<sup>66</sup> The International Court of Justice, as the principle judicial organ of the United Nations, settles in accordance with international law legal disputes submitted by various countries. INT'L CT. OF JUSTICE, GENERAL INFORMATION—THE COURT AT A GLANCE, at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (n.d.).

<sup>67</sup> Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 381 (1988).

<sup>68</sup> Custom is the oldest and the original source of international law. OPPENHEIM, *supra* note 35, at 25.

<sup>69</sup> Article 59 of the I.C.J. Statute provides that there is no doctrine of binding precedent in the I.C.J. STATUTE OF THE I.C.J. art. 59, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (n.d.). See FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 81 (Vaughan Lowe & Malgosia Fitzmaurice, eds. 1996) [hereinafter FIFTY YEARS OF THE ICJ].

subsidiary means for the determination of rules of law.<sup>70</sup>

Within the first category, the Vienna Convention on the Law of Treaties<sup>71</sup> ("Vienna Convention") attempted to codify the international law of treaties.<sup>72</sup> However, a treaty binds only the contracting states;<sup>73</sup> thus, because the United States never ratified the Vienna Convention,<sup>74</sup> it is not binding with regard to the question presented in *Chubb*. Instead, the question of whether a treaty relationship existed is left to the second category, customary international law.<sup>75</sup>

Customary international law results from a general and consistent practice of states followed out of a sense of legal obligation.<sup>76</sup> Customary rules are comprised of two elements: (1) state practice and (2) acceptance as law (*opinio juris*)<sup>77</sup>.<sup>78</sup> While treaties are a relatively straightforward source of law, custom is often much less clear.<sup>79</sup> This is so because it is often difficult to discover what states actually do, determine the weight to give to their acts, and draw normative conclusions from these acts.<sup>80</sup> Legislation and national judicial decisions may be considered when determining state

<sup>70</sup> STATUTE OF THE I.C.J. *supra* note 69, art. 38, para. 1.

<sup>71</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>72</sup> From its inception, the United Nations initiated studies and making recommendations to encourage the progressive development of international law and its codification. OPPENHEIM, *supra* note 35, at 103. Toward this end, the U.N. General Assembly formed the International Law Commission ("ILC") in 1947. *Id.* at 103-04. The ILC began work on the law of treaties in 1950. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 2 (1989) [hereinafter DEVELOPMENTS]. The ILC was intensively engaged in the codification of the law of treaties between 1962 and 1966. SHABTAI ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 29 (1970). The ILC adopted the final draft articles on the law of treaties in 1966. *Id.* at 15. The basic proposal before the Vienna Conference was the Final Draft of the ILC. THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 20 (compiled by Dr. Ralf Günter Wetzel; Professor Dr. Dietrich Rauschning ed. 1978) [hereinafter TRAVAUX PRÉPARATOIRES]; see also OPPENHEIM, *supra* note 35, at 1198.

<sup>73</sup> OPPENHEIM, *supra* note 35, at 1260 (explaining that generally a treaty does not create obligations or rights for a third state without its consent).

<sup>74</sup> The Senate objected to the Vienna Convention primarily because it defines "treaty" too broadly. Frankowska, *supra* note 67, at 296-97. The Senate also objected to the Vienna Convention's provision that a violation of treaty-making procedure may invalidate a state's consent to be bound. *Id.*

<sup>75</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 6; see OPPENHEIM, *supra* note 35, at 1198-99.

<sup>76</sup> LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 51 (3d ed. 1993).

<sup>77</sup> A belief that international law, as opposed to moral obligation, mandates the conduct. BLACK'S LAW DICTIONARY 1119 (Bryan A. Garner ed., 1999).

<sup>78</sup> FIFTY YEARS OF THE ICJ, *supra* note 69, at 68. See S.S. Lotus (Turkey v. France), 1927 P.C.I.J., (ser. A) No. 10, at 28 (Sept. 7), 4 Ann. Dig. 5, 7; North Sea Continental Shelf (Germany v. Denmark), 1969 I.C.J. 3, 44, para. 77 (Feb. 20), 41 I.L.R. 29, 73-74.

<sup>79</sup> FIFTY YEARS OF THE ICJ, *supra* note 69, at 67.

<sup>80</sup> *Id.*

practice.<sup>81</sup> Decisions of national courts may also be cited as evidence of *opinio juris*.<sup>82</sup> In addition, because of the Vienna Convention's widespread acceptance,<sup>83</sup> it serves as an indication of state practice and *opinio juris*.<sup>84</sup>

While the Vienna Convention may not be binding upon nonparty countries, it nevertheless may serve as a source of customary international law.<sup>85</sup> The International Court of Justice has held that a multilateral convention might codify existing customary law, and that the process of elaborating and concluding a convention might crystallize a customary rule, which was previously only emerging.<sup>86</sup> Many of the Vienna Convention's articles codified existing customary international law regarding the law of treaties.<sup>87</sup> In addition, because the Vienna Convention enumerated the signatories' understanding of international law, the contents of the treaty represent evidence of customary international law.<sup>88</sup> Thus, as explained by the court of appeals in *Chubb*, even though the United States has not ratified the Vienna Convention, the United States has generally recognized the

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<sup>81</sup> *Id.* at 69. See, e.g., *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, 1955 I.C.J. 4, 22-23 (Apr. 6), 22 I.L.R. 358-60; *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Second Phase, 1970 I.C.J. 3, 38-39, paras. 56-58 (Feb. 5), 46 I.L.R. 178, 212-13.

<sup>82</sup> FIFTY YEARS OF THE ICJ, *supra* note 69, at 82; see OPPENHEIM, *supra* note 35, at 41 ("Decisions of courts and tribunals are a subsidiary and indirect source of international law.").

<sup>83</sup> Seventy-nine countries approved the final text. TRAVAUX PRÉPARATOIRES, *supra* note 72, at 12.

<sup>84</sup> See FIFTY YEARS OF THE ICJ, *supra* note 69, at 69 (quoting *North Sea Continental Shelf (Germany v. Denmark)*, 1969 I.C.J. 3, 42, para. 73 (Feb. 20), 41 I.L.R. 29, 72 ("[E]ven without the passage of any considerable period of time, a very widespread and representative participation . . . might suffice of itself.")).

<sup>85</sup> See DEVELOPMENTS, *supra* note 72, at 123-24.

<sup>86</sup> FIFTY YEARS OF THE ICJ, *supra* note 69, at 73. It should be noted, however, that decisions of the I.C.J. are not a direct source of law in international adjudications. OPPENHEIM, *supra* note 35, at 41. See *also id.* at 33-34.

<sup>87</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 12. However, codification has at least two distinct meanings: (1) translating into statutes conventions of customary law with little or no alteration of the law; and (2) securing agreement among states based on existing international law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible. OPPENHEIM, *supra* note 35, at 97 n.1. A number of the Vienna Convention's provisions reflect the "progressive development of international law" rather than custom. HENKIN ET AL., *supra* note 76, at 416-17. Thus, the ILC "deliberately included a statement to the effect that the draft articles contain elements of progressive development and of codification of the law. . . ." DEVELOPMENTS, *supra* note 72, at 6; see *also* TRAVAUX PRÉPARATOIRES, *supra* note 72, at 8. The ILC Statute defines "progressive development" as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States," and "codification" as "the more precise formulation and systematization of rules of public international law in fields where there has already been extensive State practice, precedent and doctrine." DEVELOPMENTS, *supra* note 72, at 6.

<sup>88</sup> See OLIVER J. LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* 34 (1965) ("[A] treaty may also record the parties' understanding of a norm of general international law and thus serve as evidence of the latter."); see *also* TRAVAUX PRÉPARATOIRES, *supra* note 72, at 12.

Vienna Convention as an authoritative guide to the customary international law of treaties.<sup>89</sup>

The executive branch has often cited the Vienna Convention as an authoritative codification of customary international law.<sup>90</sup> In some instances, the Department of State has even changed its position on customary rules regarding the law of treaties based on the Vienna Convention.<sup>91</sup> Other countries, as well as the International Court of Justice, also recognize that to a large degree the Vienna Convention is a restatement of the customary international law of treaties.<sup>92</sup> Thus, even though U.S. courts are not constrained to follow the formal scheme of the Vienna Convention,<sup>93</sup> it is nonetheless considered the principal authoritative source of the law of treaties.<sup>94</sup> As a result, U.S. courts frequently cite the Vienna Convention when determining the international law of treaties.<sup>95</sup>

2. *Under General Principles of Treaty Interpretation, Article 40(5) of the Vienna Convention Suggests that South Korea's Adherence to the Hague Protocol May Have Created Warsaw Convention Treaty Relations Between South Korea and the United States*

At the time of the shipment in *Chubb*, South Korea adhered to the Warsaw Convention as amended by the Hague Protocol but did not separately adhere to the original Warsaw Convention.<sup>96</sup> Article 40(5) of the

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<sup>89</sup> *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308-09 (2d Cir. 2000). The American Law Institute took the Vienna Convention as its "black letter" for setting out principles relating to the law of treaties. Frankowska, *supra* note 67, at 286.

<sup>90</sup> Frankowska, *supra* note 67, at 286, 298-301. As of 1998, the specific provisions the State Department regarded as codifying existing law included articles 2, 18, 20, 25, 26, 31, 32, 33, 35, 36, 46, 56, 60, and 63. *Id.* at 299 n.81. U.S. courts give weight to the Government's interpretation of international law. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 160 (2000). See, e.g., *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-86 (1982).

<sup>91</sup> Frankowska, *supra* note 67, at 301.

<sup>92</sup> HENKIN ET AL., *supra* note 76, at 416-17; Frankowska, *supra* note 67, at 286.

<sup>93</sup> AUST, *supra* note 90, at 160; see also Frankowska, *supra* note 67, at 286-87.

<sup>94</sup> HENKIN ET AL., *supra* note 76, at 416.

<sup>95</sup> See, e.g., *Sale v. Haitian Centers Council, Inc.* 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing art. 31(1)); *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982) (citing art. 2(1)(a)); *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104-05 (2d Cir. 1997) (citing arts. 31 and 32); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361-62 (2d Cir. 1992) ("We have previously applied the Vienna Convention in interpreting treaties (citation omitted) as has the United States Department of State."); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) (quoting *Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.")).

<sup>96</sup> See *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 304 (2d Cir. 2000).

Vienna Convention addresses the effect of a new party's adherence to a treaty after an amending agreement has entered into force:

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
  - (a) be considered a party to the treaty as amended; and
  - (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.<sup>97</sup>

The Second Circuit in *Chubb* found ambiguity in the phrase "becomes a party to the treaty."<sup>98</sup> The court questioned whether this was intended to mean (1) accession to the *original* treaty after an amending instrument has entered into force, or (2) accession to the *amended* treaty after an amending instrument has entered into force.<sup>99</sup> Having identified this ambiguity, the court put Article 40(5) aside, without applying the Vienna Convention's factors for treaty interpretation.<sup>100</sup> Parts IV.A.2(a) and (b) will apply the principles of treaty interpretation set forth in the Vienna Convention in an attempt to ascertain the meaning of Article 40(5).

a. *The Vienna Convention's principles of treaty interpretation*

Articles 31 and 32 of the Vienna Convention provide guidelines for the interpretation of treaties. These articles are widely considered to be representative of customary international law.<sup>101</sup> In addition, the International Court of Justice and the European Court of Human Rights have held that these articles reflect customary international law.<sup>102</sup> Article 31, "General rule of interpretation," begins:

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<sup>97</sup> Vienna Convention, *supra* note 71, art. 40, para. 5. Article 40 was passed unanimously by the members of the Convention. TRAVAUX PRÉPARATOIRES, *supra* note 72, at 299.

<sup>98</sup> *Chubb*, 214 F.3d at 309.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 309-10.

<sup>101</sup> See Frankowska, *supra* note 67, at 299 n.81; Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Rec. des Cours 42-48 (1978-I) quoted in HENKIN ET AL., *supra* note 76, at 475 ("Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law.").

<sup>102</sup> See *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 21, 100 I.L.R. 1, 20 (Feb. 3); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 5, 14, 57 I.L.R. 200, 213-14 (1975).

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>103</sup>

This article puts the textual approach to interpretation, which seeks to determine a treaty's meaning from its text, ahead of the functional approach, which seeks to give effect to the common or real intention of the parties.<sup>104</sup> The Commentary to the International Law Commission ("ILC")<sup>105</sup> Final Draft of proposed articles for the Vienna Convention explained that the proposed method of interpretation was "based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."<sup>106</sup>

Despite the Vienna Convention's emphasis on the textual approach, determination of the ordinary meaning cannot be done in the abstract, but rather, only in the context of the treaty and in light of its objectives and purpose.<sup>107</sup> Therefore, treaty interpretation begins with an analysis of the specific provisions of the treaty concerning the question in dispute,<sup>108</sup> and goes on to consider the context. Other provisions of the treaty, including its preamble, annexes, and related instruments made in connection with the conclusion of the treaty, give particular emphasis to the object and purpose of the treaty as it appears from these materials.<sup>109</sup>

At the practical level, the consideration given the *travaux préparatoires*<sup>110</sup> of the treaty distinguishes the textual approach from the functional approach.<sup>111</sup> Functionalists put the *travaux préparatoires* on the same level as the text, whereas textualists assign more importance to the

<sup>103</sup> Vienna Convention, *supra* note 71, art. 31, para. 1.

<sup>104</sup> HENKIN ET AL., *supra* note 76, at 475-76; OPPENHEIM, *supra* note 35, at 1271.

<sup>105</sup> See *supra* note 72.

<sup>106</sup> HENKIN ET AL., *supra* note 76, at 476.

<sup>107</sup> AUST, *supra* note 90, at 188.

<sup>108</sup> See, e.g., Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99, 104-05 (2d Cir. 1997).

<sup>109</sup> HENKIN ET AL., *supra* note 76, at 476. This approach falls short, however, of making the object and purpose an autonomous element in interpretation, independent of and on the same level as the text, as is advocated by the partisans of the teleological approach to interpretation. *Id.*

<sup>110</sup> The French for *preparatory works*. BLACK'S LAW DICTIONARY 1119 (Bryan A. Garner ed., 1999). *Travaux préparatoires* include successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretive statements by the chairman of a drafting committee and ILC, and Commentaries. AUST, *supra* note 90, at 197.

<sup>111</sup> HENKIN ET AL., *supra* note 76, at 476.



text. The Vienna Convention again favors the textualist approach. Article 32, "Supplementary means of interpretation," provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.<sup>112</sup>

Thus, when the text is ambiguous, the *travaux préparatoires* may help determine the meaning.<sup>113</sup>

Nevertheless, the inclusion of this rule in a separate article does not require that the *travaux préparatoires* be examined only after exhausting the methods of Article 31.<sup>114</sup> The process is largely a simultaneous one. As one of the drafters commented, "all the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation."<sup>115</sup> In practice, the preparatory works are frequently examined and often taken into account.<sup>116</sup>

*b. Application of articles 31 and 32 to the construction of article 40(5)*

The general rule of international law is that a state cannot be bound by a treaty unless the state gives its consent.<sup>117</sup> However, once a treaty has been amended, if a new party accedes to either the original version or to the amending agreement, the new party's intent is not clear. Article 40(5) of the Vienna Convention addresses the situation where a state "becomes a party to the treaty after the entry into force of the amending agreement."<sup>118</sup> The source of confusion is whether the word "treaty" refers to the original treaty or to the amended treaty.<sup>119</sup> The text gives no apparent indication as to the specific meaning of this phrase. In subsections (a) and (b) of Article 40(5),

<sup>112</sup> Vienna Convention, *supra* note 71, art. 32.

<sup>113</sup> AUST, *supra* note 90, at 197.

<sup>114</sup> HENKIN ET AL., *supra* note 76, at 477.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; see, e.g., Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99, 105 (2d Cir. 1997).

<sup>117</sup> Vienna Convention, *supra* note 71, art. 34; OPPENHEIM, *supra* note 35, at 1260.

<sup>118</sup> Vienna Convention, *supra* note 71, art. 40, para. 5; see *supra* note 97 and accompanying text.

<sup>119</sup> See *supra* text accompanying note 99.

the drafters selected the more specific terms “the treaty as amended” and “the unamended treaty,” respectively.<sup>120</sup> In ordinary usage, in the context of a multilateral treaty that has been amended, Article 40(5) could equally refer to the original treaty after the amending agreement comes into force, or to the amended treaty.

It seems certain that the drafters of the Vienna Convention at a minimum intended to address the situation where a state accedes only to the original treaty. Consulting the *travaux préparatoires* provides some insight into the meaning of Article 40(5). The Commentary to the ILC Final Draft indicates that paragraph five was added to that draft during the ILC’s final session<sup>121</sup> in order to address the ambiguous and potentially confusing situation where a state adheres to the original treaty after an amending instrument has entered into force:

The problem then is what is to be the position of a State which only becomes a party to the original treaty after the amending agreement is already in force. . . . [T]he Commission was informed by the Secretariat that it is by no means uncommon for a State to ratify or otherwise establish its consent to the treaty without giving any indication as to its intentions regarding the amending agreement;<sup>122</sup> and that in these cases the instrument of ratification, acceptance, etc. is presumed by the Secretary-General in his capacity as a depositary to cover the treaty with its amendments.<sup>123</sup>

The question then becomes whether the drafters meant to address *only* the situation where a state accedes solely to the original treaty. It should be noted that “the use of similar but different terms, or a change in terminology from an earlier text . . . may indicate that the drafters intended a general meaning for the terms rather than a strict and specific meaning.”<sup>124</sup> Thus, the drafters’ choice to omit the word “original” in the final text of Article 40(5) may indicate a deliberate attempt to make the provision more expansive than the ILC Draft Commentary. It is plausible that the final text

<sup>120</sup> Vienna Convention, *supra* note 71, art. 40, para. 5; *see supra* note 97 and accompanying text.

<sup>121</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 298.

<sup>122</sup> As of May 1988, twenty-one countries adhered to the original Warsaw Convention but not to the Hague Protocol. *See* GOLDHIRSCH, *supra* note 35, at 285-92. At least nine of these acceded to the Warsaw Convention after the Hague Protocol had come into force. *Id.*

<sup>123</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 298-99 (citing the Commentary to the ILC Final Draft); *see also* T.O. ELIAS, THE MODERN LAW OF TREATIES 93 n.7 (1974).

<sup>124</sup> OPPENHEIM, *supra* note 35, at 1273 n.12.

was intended to have effect if the new party became a party to either the original treaty or the amended treaty.

This is evident from the ILC Draft Commentary, which explained the basis upon which the drafters founded paragraph five:

[The Commission] considered that this rule should be based on two principles: (a) the right of the State, on becoming a party to the treaty, to decide whether to become a party to the treaty alone, to the treaty plus the amending agreement or to the amended treaty alone; (b) in the absence of any indication by the State, it is desirable to adopt a solution which will bring the maximum number of States into mutual relations under the treaty.<sup>125</sup>

Undeniably, in the situation where a new party adheres only to the original treaty, the drafters of Article 40(5) chose to favor the second principle.<sup>126</sup> As one commentator pointed out, “[t]he substance of paragraph five lies in its subparagraph (a), which establishes the presumption that the State also becomes a party to the treaty as amended. The State is presumed bound by the amending agreement, although it did not expressly consent to such agreement.”<sup>127</sup> The members of the Vienna Conference unanimously voted in favor of this exception to the general rule that without its express consent a state is not bound by any agreement.<sup>128</sup> The same line of reasoning may well have led the drafters to the conclusion that this exception should also govern the situation where a state becomes a party to the amending agreement but does not expressly consent to the original version of the treaty.

This construction—that Article 40(5) was intended to have effect if the new party became a party to either the original treaty or the amended treaty—would be consistent with the principle of maximum effectiveness, which has been recognized by the International Court of Justice in the context of treaty interpretation.<sup>129</sup> Under this rule, other things being equal, “texts are to be presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force . . . and so as to

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<sup>125</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 299.

<sup>126</sup> See ELIAS, *supra* note 123, at 93.

<sup>127</sup> Frankowska, *supra* note 67, at 365.

<sup>128</sup> TRAVAUX PRÉPARATOIRES, *supra* note 72, at 299; see *supra* note 117 and accompanying text.

<sup>129</sup> G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y. B. I. L. 1, 8-9, 18-20 (1951).

have the *fullest* value and effect consistent with their wording . . . and with the other parts of the text.”<sup>130</sup> On the other hand, care must be taken in attributing significance to variations in terminology, lest an interpreter “find himself distorting passages [because] he imagines that the drafting is stamped with infallibility.”<sup>131</sup>

In summary, the aim of treaty interpretation is to determine “the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen.”<sup>132</sup> Unfortunately, it is not clear whether the parties to the Vienna Convention intended Article 40(5) to bear any meaning in relation to the circumstances in which a state adheres to an amending agreement but does not expressly adhere to the original treaty. While the *travaux préparatoires* shed some light on the subject, they leave the question unresolved.

Nevertheless, in light of the generally accepted presumption that a new party to a treaty is bound by an existing amending agreement even if the state did not expressly consent to it, and given the principle of maximum effectiveness, it would not be unreasonable to infer that adherence to an amending agreement results not only in treaty relations with parties to the amending agreement, but also with parties to the original treaty. In fact, some experts have construed Article 40(5) in this fashion.<sup>133</sup> If this interpretation is accepted, South Korea should be considered to have a proper treaty relationship with the United States regarding the Warsaw Convention.

### 3. *Under General Principles of Treaty Interpretation, South Korea's Adherence to the Hague Protocol Created Treaty Relations Between South Korea and the United States*

Regardless of whether Article 40(5) is construed to have effect in the scenario presented in *Chubb*, the provisions of the Hague Protocol may be dispositive, because a specific provision of a treaty takes precedence over the general law of treaties.<sup>134</sup> That is to say, the specific provisions of the Hague Protocol may determine the result of adherence to the Hague Protocol

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<sup>130</sup> *Id.* (emphasis in original) quoted in HENKIN ET AL., *supra* note 76, at 480; see also *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978) (“[T]he Convention is to be so construed as to further its purposes to the greatest extent possible . . .”).

<sup>131</sup> *Pertulosa Claim*, 18 I.L.R. 414, 418 (Franco-Italian Council Comm'n 1951).

<sup>132</sup> OPPENHEIM, *supra* note 35, at 1267.

<sup>133</sup> See *infra* Part IV.A.4.b.

<sup>134</sup> See Vienna Convention, *supra* note 71, art. 40, para. 1.

without express adherence to the Warsaw Convention in accordance with, or even contrary to, the intended meaning of Article 40(5).

a. *The ordinary meaning of the text of the Hague Protocol does not provide a definitive answer to the issue in Chubb*

Articles XXI and XXIII of the Hague Protocol provide that ratification or “[a]dherence to this Protocol by any State which is not a Party to the [Warsaw] Convention shall have the effect of adherence to the [Warsaw] Convention as amended by this Protocol.”<sup>135</sup> The court of appeals focused on the words “as amended” to support the conclusion that adherence to the Hague Protocol cannot bind states to the original Warsaw Convention.<sup>136</sup> However, some commentators have construed this language as binding the new party to the original treaty with respect to states that adhere solely to the original Warsaw Convention.<sup>137</sup>

In addition, the Hague Protocol provides that “[f]or the purposes of this Convention,<sup>138</sup> the expression *international carriage* means any carriage in which . . . the place of departure and the place of destination . . . are situated . . . within the territories of two High Contracting Parties. . . .”<sup>139</sup> The Hague Protocol adds Article 40 A, which provides in relevant part that “the expression High Contracting Party shall mean a State whose ratification of or adherence to the Convention<sup>140</sup> has become effective and whose denunciation thereof has not become effective.”<sup>141</sup>

The wording of these articles does not distinguish between High Contracting Parties to the Hague Protocol and to the Warsaw Convention. A reasonable inference is that the drafters of the Hague Protocol intended parties to the original Warsaw Convention, which ratified the Hague Protocol, to continue in treaty relations with parties to the original treaty that chose not to ratify the amending agreement.<sup>142</sup> It is not clear, however,

<sup>135</sup> Hague Protocol, *supra* note 6, art. XXI, para. 2; art. XXIII, para. 2.

<sup>136</sup> Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 310 (2d Cir. 2000).

<sup>137</sup> See *infra* Part IV.A.4.a.

<sup>138</sup> It should be noted that the Hague Protocol is replete with references to “this Convention,” a phrase which seems to inextricably intertwine the Hague Protocol with the Warsaw Convention. See, e.g., Hague Protocol, *supra* note 6, arts. I-IV, IX, XIV.

<sup>139</sup> Hague Protocol, *supra* note 6, art. I, para. (a) (emphasis in original). Although the wording in this paragraph was modified from the original Warsaw Convention, the relevant wording quoted here did not change. Compare this with Warsaw Convention, *supra* note 3, art. 1, para. 2; see *supra* note 42 and accompanying text.

<sup>140</sup> Hague Protocol, *supra* note 6, art. XVII. References to “the Convention” in the Hague Protocol generally refer specifically to the original Warsaw Convention.

<sup>141</sup> Hague Protocol, *supra* note 6, art. XVII.

<sup>142</sup> See Mankiewicz, *supra* note 61, at 89-90.

whether the drafters intended that (or even discussed) whether new parties to the Hague Protocol alone should be in treaty relations with parties to the original Warsaw Convention.

The text of the Hague Protocol does not provide a definite answer to this question. Given this uncertainty, an interpretation of the Hague Protocol must look beyond the text.

*b. The subsequent practice of the United States and South Korea confirms that both parties intended to create treaty relations under the Warsaw Convention*

Article 31 of the Vienna Convention, “General rule of interpretation,” provides:

- (3) There shall be taken into account, together with the context:
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>143</sup>

Thus, when the meaning of the text in a treaty is uncertain, the relevant conduct of the contracting parties after the conclusion of the treaty has a high probative value as to their intent.<sup>144</sup> This is sometimes referred to as “practical construction.”<sup>145</sup> In general, if one of the parties to a treaty makes known the meaning it attributes to a provision, and a dispute later arises regarding the application of that provision, another party cannot then insist upon a different meaning, unless that party has previously taken necessary steps—such as protest—to rebut the implication that it has acquiesced to the first party’s interpretation.<sup>146</sup>

Subsequent practice constitutes objective evidence of the parties’ agreement as to the meaning of the treaty.<sup>147</sup> Thus, if a treaty has been commonly applied by the parties—even in a manner different from that contemplated at the time of its conclusion—the “subsequent practice, and the new expectations connected with it, may properly form the basis of interpretation.”<sup>148</sup> For this reason, U.S. courts have often relied on

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<sup>143</sup> Vienna Convention, *supra* note 71, art. 31, para. 3.

<sup>144</sup> Frankowska, *supra* note 67, at 342.

<sup>145</sup> *Id.*; *see, e.g.*, Kreimerman v. Casa Veerkamp, S.A., 22 F.3d 634, 638 (5th Cir. 1994).

<sup>146</sup> OPPENHEIM, *supra* note 35, at 1280.

<sup>147</sup> ELIAS, *supra* note 123, at 76.

<sup>148</sup> LISSITZYN, *supra* note 88, at 28-29.

subsequent conduct as evidence of the intent of the parties.<sup>149</sup> Of specific importance to this analysis, a state's conduct may imply consent to accede to a treaty.<sup>150</sup> Moreover, "[i]t is not necessary that every one of the parties to the treaty should have engaged in the particular practice; it is sufficient that there is evidence that every party has accepted the practice, even by tacit consent or acquiescence."<sup>151</sup>

Prior to *Chubb*, U.S. courts had decided many cases involving air transportation between the United States and South Korea under the Warsaw Convention. For example, multiple lawsuits arose from the Korean Air Lines ("KAL") flight that was shot down over Soviet airspace on September 1, 1983 while en route from New York to Seoul.<sup>152</sup> While these cases addressed air carrier liability for passenger death, as opposed to liability for lost cargo, they were indistinguishable from *Chubb* with respect to the treaty relationship between South Korea and the United States.<sup>153</sup> In one case, the district court dedicated nearly six pages of its opinion to the history of the Warsaw Convention and the Hague Protocol, and the question of whether treaty jurisdiction existed in that case. The court of appeals explicitly adopted the lower court's opinion.<sup>154</sup>

That case, as well as several others, reached the Supreme Court.<sup>155</sup> In each of the KAL cases, subject matter jurisdiction was based on the Warsaw Convention treaty relationship between South Korea and the United States.<sup>156</sup> By not raising the question of subject matter jurisdiction, the Supreme Court's ruling on the merits of these cases implicitly affirmed the existence of a treaty relationship between the United States and South Korea.<sup>157</sup> Moreover, U.S. courts have found a treaty relationship between

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<sup>149</sup> Frankowska, *supra* note 67, at 342; *see, e.g.*, *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972); *Day v. Trans World Airlines*, 528 F.2d 31, 35-36 (2d Cir. 1975); *see also Barr v. United States Dep't of Justice*, 819 F.2d 25, 28 (2d Cir. 1987).

<sup>150</sup> LISSITZYN, *supra* note 88, at 27; *see also AUST, supra* note 90, at 90.

<sup>151</sup> ELIAS, *supra* note 123, at 76.

<sup>152</sup> *See, e.g.*, *Dooley v. Korean Air Lines*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987); *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985).

<sup>153</sup> Air carrier liability for passenger death is addressed in Article 17 of the Warsaw Convention and liability for lost cargo in Article 18. Warsaw Convention, *supra* note 3, arts. 17, 18.

<sup>154</sup> *See Korean Air Lines*, 664 F. Supp. at 1464-69, *aff'd and opinion adopted* 829 F.2d 1171, 1173 (D.C. Cir. 1987).

<sup>155</sup> *See Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996); *Dooley v. Korean Air Lines*, 524 U.S. 116 (1998).

<sup>156</sup> *See supra* note 152.

<sup>157</sup> The Supreme Court is required to raise the issue of subject matter jurisdiction *sua sponte*. *Mt. Healthy School Dist. Board of Education v. Doyle*, 429 U.S. 274, 278 (1977). *See infra* note 206 and

the United States and South Korea in cases involving air transport of cargo.<sup>158</sup>

South Korea's silence in the face of the U.S. courts' exercise of jurisdiction over these cases likely demonstrated sufficient acquiescence to establish tacit consent to the existence of treaty relations between the two countries. If so, South Korea's conduct amounted to implicit consent to be bound by the original Warsaw Convention with respect to the United States. South Korea and the Second Circuit cannot now insist upon a different interpretation.

4. *Most Scholars Agree that when a State Adheres Only to an Amended Treaty, it Becomes a Party to the Original Treaty with Respect to States that Are Parties Only to the Original Treaty*

The Statute of the International Court of Justice enumerates as a subsidiary source of international law "the teachings of the most highly qualified publicists of the various nations."<sup>159</sup> A number of highly qualified scholars have commented on the scenario where a state becomes a party to an amended treaty but does not expressly adhere to the original treaty. Most have agreed that in this situation the state becomes a party to the original treaty with respect to states that are parties only to the original treaty. While some commentators have based this conclusion on Article 40(5) of the Vienna Convention, others have looked to the text of the Hague Protocol to formulate the same conclusion.

a. *Scholars examining the Hague Protocol*

Mankiewicz, an authority on the Warsaw Convention and the Hague Protocol,<sup>160</sup> contends that a state which adheres solely to the Hague Protocol,

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accompanying text. Considering the extent of the district court and court of appeals opinions' treatment of subject matter jurisdiction, it is reasonable to assume the Supreme Court was fully apprised of the issue.

<sup>158</sup> See, e.g., *Hyosung (America), Inc. v. Japan Air Lines*, 624 F. Supp. 727 (S.D.N.Y. 1985); *Nissan Fire & Marine Ins. Co. v. Singapore Airlines*, No. C 91-3858, 1992 U.S. Dist. LEXIS 4589 (N.D. Cal. Mar. 27, 1992).

<sup>159</sup> See *supra* note 70 and accompanying text.

<sup>160</sup> Mankiewicz, formerly the Secretary General of the Institute of Comparative Law in Lyons, France, which sponsored the Hague Conference, published articles about the Hague Protocol as early as 1955. Mankiewicz, *supra* note 61. He has been a teaching professor at several universities in Canada (McGill University and Sherrooke University), France (Université de Paris), and other countries. Diederiks-Verschoor, *Foreword* to RENÉ H. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER XXIII* (1981).



as South Korea does, also becomes party to the Warsaw Convention.<sup>161</sup> He states that "the original Convention applies not only to carriage between countries parties to it, but also to carriage between a State that has ratified the Hague Protocol and a State that is a party only to the original Convention. It is immaterial whether the former State had previously ratified the original Convention. . . ."<sup>162</sup>

Other scholars have applied the same reasoning.<sup>163</sup> Under this construction of the Hague Protocol, the original Warsaw Convention applied to air transportation between South Korea, which had ratified the Hague Protocol, and the United States, which was a party only to the original Warsaw Convention. According to Mankiewicz, under Articles XXI and XXIII<sup>164</sup> of the Hague Protocol it is immaterial that South Korea had not previously ratified the Warsaw Convention.<sup>165</sup> By adhering to the Hague Protocol, South Korea entered into a treaty relationship with countries that are parties to the Warsaw Convention but do not adhere to the Hague Protocol.

Another commentator, although not taking an express stand on the precise issue at hand, appears to assume that states adhering only to the Hague Protocol would enter into a treaty relationship with all parties to the Warsaw Convention.<sup>166</sup> For example, an in-depth discussion of the meaning of "High Contracting Parties" makes no distinction between High Contracting Parties to each the Warsaw Convention and the Hague Protocol.<sup>167</sup> On the contrary, it implies that ratification of either the Warsaw Convention or the Hague Protocol results in a state becoming a High Contracting Party under the Warsaw Convention.<sup>168</sup>

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<sup>161</sup> RENÉ H. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER* 2 (1981).

<sup>162</sup> *Id.* at 3. Mankiewicz bases his conclusion not on Article 40(5) of the Vienna Convention, but rather on the Articles XXI(2) and XXIII(2) of the Hague Protocol. *Id.* See *supra* notes 56, 135-137 and accompanying text.

<sup>163</sup> GOLDHIRSCH, *supra* note 35, at 6; see also *id.* at 12 ("If a country adheres to the Hague Protocol but is not a signatory to the original Warsaw Convention, it automatically becomes an adherent of the Warsaw Convention."); Peter H. Sand, *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention*, 28 J. AIR L. & COMM. 260, 261 n.10 (1962) ("Pursuant to Art. XXIII, para. 2, ratification of the Protocol has the effect of adherence to the Convention.")

<sup>164</sup> See *supra* note 135 and accompanying text.

<sup>165</sup> MANKIEWICZ, *supra* note 161, at 3.

<sup>166</sup> See generally MILLER, *supra* note 36.

<sup>167</sup> *Id.* at 25-36.

<sup>168</sup> See *id.* at 29, 40.

b. *Scholars examining the Vienna Convention*

A prominent international law textbook states:

Paragraphs 4 and 5 [of Article 40 of the Vienna Convention] contain a much needed clarification of the relationships between the various parties to an original treaty and a series of amending agreements, particularly with regard to a state that becomes a party to an amended treaty. In that case, the state, unless it expresses a different intention, becomes both a party to the treaty as amended and a party to the unamended treaty vis-à-vis any party to the treaty not bound by the amendment.<sup>169</sup>

This statement does not appear to be limited to the situation where a new state adheres to the original treaty after an amending agreement comes into force; instead, it seems to refer specifically to the scenario where a state simultaneously becomes a party to the original treaty and to the amended treaty by adhering solely to the amended version.

Another expert<sup>170</sup> states without qualification that the unamended treaty applies between a party to the treaty which does not become a party to the amending agreement and a party to the amending agreement.<sup>171</sup> While this statement does not expressly include parties that adhere solely to the amending agreement, it may be reasonably inferred that the statement was intended as a categorical statement regarding all parties to the amending agreement. In the case of a piecemeal list of revisions that depends on the original treaty to provide the bulk of the text, such as the Hague Protocol, the inference that the party should be bound by the original treaty is all the more compelling. Thus, under the law of treaties as depicted by these scholars, South Korea became a party to the unamended Warsaw Convention with respect to the United States.

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<sup>169</sup> HENKIN ET AL., *supra* note 76, at 484.

<sup>170</sup> Aust, a former Legal Adviser to the United Kingdom Mission to the United Nations, is a Legal Counsellor at the Foreign and Commonwealth Office in London. AUST, *supra* note 90, at xvi.

<sup>171</sup> AUST, *supra* note 90, at 220.

c. *The Second Circuit relied on a single commentator whose viewpoint counters that of the majority*

In *Chubb*, the court of appeals relied on the view expressed by Frankowska,<sup>172</sup> who contends that Article 40(5) contemplates only the situation where a new party accedes to the original treaty after an amending agreement has entered into force.<sup>173</sup> Based on the premise that neither the Vienna Convention drafters nor commentators contemplated the scenario where a new party adheres solely to the amending agreement,<sup>174</sup> Frankowska postulates that South Korea should not be bound by the original Warsaw Convention, because “[u]nless it can be proven that a State consented to be bound by an international obligation, the presumption that it is *not* bound prevails.”<sup>175</sup>

However, it is not certain that this is the meaning the drafters intended. First, the International Bureaus for the Protection of Intellectual and Industrial Property raised the problem in a statement made at the Vienna Conference.<sup>176</sup> The representative raised the issue regarding the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works.<sup>177</sup> As in the case of the Warsaw Convention, several amending agreements had been made revising each of these treaties, but each revision was merely a different version of the original treaty, which continued to exist.<sup>178</sup> The representative stated:

A State, however, sometimes acceded to the most recent [amending agreement], without declaring that its accession was valid for the previous Acts. . . . In its relations with States [parties to the treaty] but not parties to the most recent Act . . . the acceding State was understood to have tacitly accepted all the previous texts, so that its relations with the States parties only to the earlier texts were governed by those earlier texts. The legal position was arguable, but the system was the only

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<sup>172</sup> Maria Frankowska, an Associate Professor of Law at Southern Illinois University School of Law at the time her article was published, had been a member of the Polish delegation to the Second Session of the Vienna Conference on the Law of Treaties in 1969. Frankowska, *supra* note 67, at 281.

<sup>173</sup> *Id.* at 364.

<sup>174</sup> *Id.* at 365.

<sup>175</sup> *Id.* (emphasis in original).

<sup>176</sup> See Vienna Conference on the Law of Treaties, First Sess. 31st mtg., statement by Woodley, *quoted in* HENKIN ET AL., *supra* note 76, at 469.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

practicable one. The Union was more important than the Convention which had set it up. Without that tacit acceptance system, the State acceding to the latest text would have no relations with half the membership of the Union.<sup>179</sup>

Thus, a scenario highly analogous to the one at issue was brought to the attention of the Vienna Conference. What action, if any, the Conference determined to take with regard to this problem may be debated; however, that the situation at issue was at least contemplated is undeniable.

Second, Frankowska's reasoning contradicts the effect of Article 40(5) that she bares out: Article 40(5) establishes the presumption that in adhering to the original treaty after an amending agreement has come into force, a state is "bound by the amending agreement, although it did not expressly consent to such agreement."<sup>180</sup> Thus, the general rule that a state is not bound unless it expressly consents to the terms<sup>181</sup> is not absolute, and in the scenario at issue the general rule may not necessarily govern. Frankowska's reasoning equates a previously nonparty state that adheres to the amending agreement to an original party that chooses not to ratify the amending agreement. This logic is flawed. In the former scenario, the new party chooses to accede to the amending agreement with full knowledge of the contents of the previously existing underlying treaty, whereas in the latter scenario the original party had agreed to the original treaty without any knowledge of the yet-to-be-conceived amendments.

A more accurate analogy may be drawn between a new party that accedes to the amending agreement and a new party that accedes to the original treaty. In each case the newly adhering state presumably acts with full knowledge of the original treaty and the amendments to it. In each of these two scenarios the party's action may be viewed as ambiguous, since it is not obvious whether the new party intends to be bound by only the original treaty, by only the amending agreement, or by both; in contrast, the inaction of a party to the original treaty in the face of a proposed amending agreement admits of only one possible meaning—that the party does not intend to be bound by the amendments. As a result, it may be reasonable to infer that the members of the Vienna Conference determined that a new party adhering either to the original treaty or to the amending agreement is presumed to be bound by both.

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<sup>179</sup> *Id.*

<sup>180</sup> Frankowska, *supra* note 67, at 365. See *supra* note 127 and accompanying text.

<sup>181</sup> See *supra* note 117 and accompanying text.

Furthermore, even if the drafters or the members of the conference had not contemplated the problem at issue in *Chubb*, and assuming for argument that Article 40(5) did not address this situation, Frankowska's conclusion does not necessarily follow. In this case, existing custom would still govern. Given the practice observed with respect to the various revisions to the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works,<sup>182</sup> there is a viable argument that customary international law generally presumes a new party to an amending agreement to have tacitly agreed to the existing treaty and previous amendments. If so, South Korea should be presumed to have tacitly agreed to the original Warsaw Convention,<sup>183</sup> placing it in treaty relations with the United States regarding that treaty.

Third, given most scholars' construction of Articles XXI and XXIII of the Hague Protocol,<sup>184</sup> the meaning attributed to Article 40(5) of the Vienna Convention may not govern the outcome regarding the Warsaw Convention, because a specific provision of a treaty takes precedence over the provisions of the Vienna Convention.<sup>185</sup> If Articles XXI and XXIII of the Hague Protocol are given the construction suggested by most scholars,<sup>186</sup> then these provisions override those of Article 40(5).

In any case, the general consensus of "the most highly qualified publicists" has been that states adhering only to the Hague Protocol are in treaty relations with states that are parties only to the original Warsaw Convention.<sup>187</sup> Thus, the weight of authority supports the opinion that South Korea should be bound by the original treaty with regard to the United States. Finally, in the introduction to her article, Frankowska candidly states that "the article focuses primarily on what courts actually do instead of what they should be doing."<sup>188</sup> For these reasons, a more appropriate conclusion may be that in adhering to the Hague Protocol South Korea did in fact enter into treaty relations with the United States regarding the Warsaw Convention.

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<sup>182</sup> See *supra* notes 177-176 and accompanying text.

<sup>183</sup> For a discussion of the effect of subsequent practice of the parties, see *supra* Part IV.A.3.b.

<sup>184</sup> See *supra* Part IV.A.4.a.

<sup>185</sup> See Vienna Convention, *supra* note 71, art. 40, para. 1.

<sup>186</sup> See *supra* Part IV.A.4.a.

<sup>187</sup> See *supra* notes 157-171 and accompanying text.

<sup>188</sup> Frankowska, *supra* note 67, at 281, 284.

5. *Policy Considerations Favor Finding Treaty Relations Between South Korea and the United States*

Regardless of whether the Warsaw Convention governs *Chubb*, Asiana would potentially be exposed to unlimited liability. If Chubb were denied a hearing in federal court, Chubb could nonetheless bring a cause of action in state court,<sup>189</sup> where Asiana could be exposed to unlimited liability under state law.<sup>190</sup> Likewise, were the original Warsaw Convention strictly applied, as this analysis would require, the federal court would retain subject matter jurisdiction over the case, the treaty would provide the cause of action,<sup>191</sup> and Asiana would face unlimited liability.<sup>192</sup>

In contrast, the rulings in the KAL cases served to limit the foreign airline's liability.<sup>193</sup> Granted, the result advocated in this analysis would have the opposite effect in *Chubb*. However, the court of appeals' decision, far from limiting Asiana's liability, potentially exposes Asiana to unlimited liability under state law, while at the same time depriving other air carriers that operate between the United States and countries that adhere solely to the Hague Protocol of all of the Warsaw Convention's protections—at least with regard to air transport of cargo. The potential losses to U.S. and foreign air carriers, especially if the Second Circuit's reasoning should be extended to cases regarding passenger liability, would far outweigh any illusory benefit in this case.

Admittedly, one of the main objectives of the Hague Protocol was to eliminate the unnecessary air waybill particulars required by the Warsaw Convention.<sup>194</sup> Thus, it may be argued that the virtue of the court of appeals' decision is to be found in its avoidance of the application of the "agreed stopping places" requirement.<sup>195</sup> Some will find that the application

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<sup>189</sup> See *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997).

<sup>190</sup> See, e.g., *Fujitsu Ltd. v. Federal Express Corp.*, No. 00-7343, 2001 WL 403012, at \*1-\*2, \*4, \*12 (2d Cir. April 20, 2001) (upholding the trial court's finding in an action grounded in breach of contract and negligence that FedEx was liable to Fujitsu for damages of \$726,640 for damage to silicon wafers during air transportation where the Warsaw Convention's liability limitations did not apply because the air waybill did not include "agreed stopping places.").

<sup>191</sup> *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978). See *infra* note 229 and accompanying text.

<sup>192</sup> Asiana's liability for the lost cargo would not be limited under a strict application of the original Warsaw Convention because Asiana did not comply with the "agreed stopping places" requirement. See *supra* notes 40-41 and accompanying text; *Tai Ping Ins. Co. v. Northwest Airlines*, 94 F.3d 29, 33 (2d Cir. 1996).

<sup>193</sup> See *supra* notes 152-157 and accompanying text.

<sup>194</sup> *Mankiewicz*, *supra* note 61, at 79, 84; *Calkins*, *supra* note 42, at 259.

<sup>195</sup> Failure to satisfy this requirement exposes the air carrier to unlimited liability. See *supra* notes 40-41 and accompanying text.

of this arcane requirement would create an unfair result.<sup>196</sup> However, the facts of *Chubb* reveal that Asiana did not simply neglect to include the “agreed stopping places” particular on the air waybill; instead, Asiana changed the destination of the shipment to one which had not been agreed between the parties. Application of the “agreed stopping places” requirement, even with respect to an adherent of the Hague Protocol, would not be nearly so egregious in these circumstances as in the case of a simple air waybill error.

Furthermore, the objective of eliminating the Warsaw Convention’s unnecessarily detailed requirements was considered far inferior to the primary objective of the Hague Protocol—increasing the liability limits for passenger injury and death.<sup>197</sup> However, in a day when individual passenger recovery resulting from an airline accident may reach \$60 million,<sup>198</sup> the Hague Protocol’s \$16,600 limit on passenger recovery has become insubstantially different from the Warsaw Convention’s \$8300 limit. Today, the benefit derived from limiting air carrier liability to either amount completely overshadows the significance of which limit is applied. No outcome in *Chubb* could justify the potential avalanche in air carrier liability that would result from extending the Second Circuit’s reasoning to all Warsaw Convention cases between the United States and countries that adhere solely to the Hague Protocol.<sup>199</sup>

Finally, any interpretation of the Hague Protocol should take into account that it was intended to amend the Warsaw Convention.<sup>200</sup> Thus, the underlying object and purpose of the Hague Protocol is that of the Warsaw Convention—uniformity in the application of the law governing international air transport.<sup>201</sup> The interpretation suggested in this analysis would further that goal; whereas, the court of appeals’ construction of the

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<sup>196</sup> See MILLER, *supra* note 36, at 101. For example, New York state courts have rejected a strict application of the “agreed stopping places” requirement. *American Smelting and Refining Co. v. Philippine Air Lines, Inc.*, 4 Av. 17,413, 17,414 (N.Y. Sup. Ct. 1954) (limiting Article 8(c) to cases where the places of departure and destination do not themselves put the passenger or consignee on notice of the international character of the flight).

<sup>197</sup> Calkins, *supra* note 42, at 262.

<sup>198</sup> James Wallace, *US Airways Accuses Boeing: Says Data Withheld, Might Have Prevented Crash*, SEATTLE POST-INTELLIGENCER, Feb. 18, 2000, at A1. Recoveries of greater the \$10 million are not unusual today. See, e.g., Byron Acohidio, *737 Rudder Woes Known for Years Boeing Told FAA in Secret of Hazard Before 1994 Crash*, SEATTLE TIMES, Feb. 19, 2000, at A1.

<sup>199</sup> Although the Second Circuit has suggested that the United States is now a party to the Hague Protocol, see *Fujitsu Ltd. v. Federal Express Corp.*, No. 00-7343, 2001 WL 403012, at \*6 (2d Cir. April 20, 2001), this conclusion is inconsistent with the court’s reasoning in *Chubb*. See *supra* note 62.

<sup>200</sup> Lowenfeld & Mendelsohn, *supra* note 47, at 504-05.

<sup>201</sup> *Id.* at 498; JEAN-LOUIS MAGDELÉNAT, AIR CARGO: REGULATION AND CLAIMS 129 (1983).

Hague Protocol would instead further segregate the already severely fragmented liability scheme of the Warsaw System.<sup>202</sup>

*B. The District Court Had Federal Question Jurisdiction over Chubb Regardless of Whether Treaty Relations Existed Between South Korea and the United States*

After deciding that treaty relations did not exist between the United States and South Korea, the court of appeals for the Second Circuit held that this deprived the district court of subject matter jurisdiction.<sup>203</sup> Nevertheless, an analysis of the case reveals that federal question subject matter jurisdiction did not depend on the outcome of the treaty question, because the treaty question itself—whether or not treaty relations existed under the circumstances in *Chubb*—presented a federal question sufficient to confer subject matter jurisdiction over the case upon the lower federal courts. Thus, even in the absence of treaty relations between the two countries, the court had jurisdiction—which included the discretion to hear any related claims.

*1. The District Court Had Jurisdiction in Chubb Independent of the Outcome of the Treaty Question*

Federal courts are courts of limited jurisdiction: “The validity of an order of a federal court depends upon that court’s having jurisdiction over both the subject matter and the parties.”<sup>204</sup> A federal court can only exercise subject matter jurisdiction if both the U.S. Constitution and federal legislation authorize such jurisdiction.<sup>205</sup> Not only is subject matter jurisdiction required, but also federal courts are required to raise the lack of subject matter jurisdiction on their own motion.<sup>206</sup> Unlike personal

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<sup>202</sup> See MAGDELÉNAT, *supra* note 201, at 129 (“The original intention of the Warsaw Convention, as stated in its title, was to ‘unify certain rules’ relating to international carriage by air. Today, this is far from being the case. . . . [T]he problems arising out of the Warsaw Convention are viewed differently in the various legal systems, thus jeopardizing its very purpose of unification.”). Extending the Second Circuit’s reasoning to other Warsaw Convention amending agreements further propagates this fragmentation. See *supra* notes 62, 199.

<sup>203</sup> *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 314 (2d Cir. 2000).

<sup>204</sup> *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

<sup>205</sup> *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983); *Ins. Corp. of Ireland*, 456 U.S. at 701.

<sup>206</sup> *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977); see also *Ins. Corp. of Ireland*, 456 U.S. at 701-02; *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).



jurisdiction, subject matter jurisdiction cannot be conferred by the parties' consent.<sup>207</sup>

The Constitution provides for federal question, or "arising under," jurisdiction over "all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority."<sup>208</sup> Treaty jurisdiction is a category of federal question jurisdiction. In 28 U.S.C. § 1331, Congress has provided that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."<sup>209</sup> Furthermore, under the Constitution, treaties are considered a part of the "supreme Law of the Land."<sup>210</sup> Thus, U.S. courts have held that claims arising under U.S. treaties are within the federal question jurisdiction of both Article III and § 1331.<sup>211</sup> Treaties enjoy essentially the same status in U.S. courts as federal statutes.<sup>212</sup> Thus, treaties create enforceable rights and preempt inconsistent state law.<sup>213</sup>

Furthermore, the Supreme Court has held that this status applies to international law generally: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."<sup>214</sup> Thus, issues concerning customary international law also fall under federal question jurisdiction.

*a. An allegation that a treaty creates a cause of action is a federal question*

Whether a case arises under federal law within the meaning of § 1331 is decided by applying the "well-pleaded complaint" rule: "[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or

<sup>207</sup> *Ins. Corp. of Ireland*, 456 U.S. at 702.

<sup>208</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>209</sup> 28 U.S.C. § 1331.

<sup>210</sup> U.S. CONST. art. VI, cl. 2; *Abramson v. Japan Airlines*, 587 F. Supp. 1099, 1102 (D.C. N.J. 1983).

<sup>211</sup> *See, e.g., In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991); *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978).

<sup>212</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 115 (1987).

<sup>213</sup> *See U.S. v. Belmont*, 301 U.S. 324, 331-32 (1937); *Boehringer-Mannheim Diagnostics, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984).

<sup>214</sup> *Paquete Habana*, 175 U.S. 677, 700 (1900).

declaration. . . .”<sup>215</sup> Defenses claimed in the defendant’s answer, or the plaintiff’s anticipation in the complaint of those defenses, are not relevant to the analysis.<sup>216</sup> Therefore, based solely on the plaintiff’s well-pleaded complaint, the court determines whether the suit arises under federal law.<sup>217</sup>

The statutory “arising under” clause in § 1331 has been more narrowly construed than the corresponding constitutional clause.<sup>218</sup> The basic rule, as explained in *American Well Works Co. v. Layne & Bowler Co.*, is that “[a] suit arises under the law that creates the cause of action.”<sup>219</sup> Thus, the cause of action generally must have its basis in federal law. However, the application of this rule has not been entirely rigid.<sup>220</sup>

For example, in *Bell v. Hood*,<sup>221</sup> the Supreme Court held that the lower court had jurisdiction because the outcome depended on an interpretation of federal statutes and the Constitution.<sup>222</sup> The Court explained that the district court had jurisdiction because the right of the petitioners to recover under their complaint would be sustained if the Constitution and laws of the United States were given one construction and defeated if they were given another.<sup>223</sup> Two of the justices dissented in *Bell*, asserting that whether the complaint states a cause of action arising under the Constitution or laws of the United States “is for the court, not the pleader, to say.”<sup>224</sup> Nevertheless, the dissent agreed with the majority that when federal law affords a remedy which may in some circumstances be availed of by a plaintiff, “the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction.”<sup>225</sup>

Thus, although a lawsuit may be dismissed for lack of jurisdiction if the alleged federal claim “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly

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<sup>215</sup> *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)).

<sup>216</sup> *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (dismissing the case for lack of subject matter jurisdiction, which had been asserted in anticipation of a federal defense to the plaintiff’s nonfederal cause of action).

<sup>217</sup> *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983).

<sup>218</sup> *Id.*

<sup>219</sup> *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

<sup>220</sup> *Franchise Tax Board*, 463 U.S. at 9 (1983).

<sup>221</sup> *Bell v. Hood*, 327 U.S. 678 (1946).

<sup>222</sup> *Id.* at 685; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983).

<sup>223</sup> *Bell*, 327 U.S. at 685.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

insubstantial and frivolous,"<sup>226</sup> as long as the plaintiff has a good faith reason to believe that federal law may apply, jurisdiction is sufficiently established by an allegation of a claim under federal law.<sup>227</sup> In accordance with *United Mine Workers of America v. Gibbs*, once subject matter jurisdiction has been established, even if the federal claim is subsequently dismissed as not being one upon which relief can be granted, lower federal courts nevertheless have discretion to retain jurisdiction over related claims, whether based on federal or state law.<sup>228</sup>

b. *Treaty jurisdiction should have attached in Chubb, because the plaintiff's complaint asserted a substantial, nonfrivolous cause of action under a valid treaty of the United States*

If a treaty relationship existed between South Korea and the United States, the dispute in *Chubb* fell squarely within federal question subject matter jurisdiction. The Second Circuit has explicitly held that the Warsaw Convention creates a cause of action.<sup>229</sup> Therefore, a case brought under the Warsaw Convention meets the *American Well Works* test for "arising under" federal law. Thus, if the treaty applied to international air transport between South Korea and the United States, the cause of action in *Chubb* arose under the Warsaw Convention, and since a U.S. treaty is federal law, the suit arose under federal law and federal question subject matter jurisdiction attached.

Furthermore, even if, as the court of appeals concluded, no treaty relationship existed, *Chubb*, like *Bell*, nonetheless is within the constitutional and statutory jurisdictional limits of federal questions. Even though *Chubb* may not have met the strict *American Well Works* test,<sup>230</sup> *Chubb's* right to relief under the claims on the face of its complaint required interpretation of a U.S. treaty, in order to determine whether a treaty relationship existed between South Korea and the United States. Since U.S. treaties, as well as customary international law, are part of federal law, by analogy to *Bell*, *Chubb* included a question of federal law.

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<sup>226</sup> *Id.* at 682-83.

<sup>227</sup> *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977).

<sup>228</sup> 28 U.S.C. § 1367 (1994); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) (holding that federal courts have discretion to hear supplemental state law claims even after all federal claims have been dismissed, as long as the state and federal claims "derive from a common nucleus of operative fact").

<sup>229</sup> *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978). The Warsaw Convention is a self-executing treaty; *i.e.*, no domestic legislation is required to give it the force of law. *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

<sup>230</sup> See *supra* note 219 and accompanying text.

Chubb's claim under the Warsaw Convention was neither insubstantial nor frivolous. In light of the numerous cases that had previously been adjudicated in federal courts under treaty jurisdiction based on the Warsaw Convention treaty relationship between the United States and South Korea, Chubb had a strong "good faith reason" to believe that the treaty would apply to the dispute. Chubb's basis for alleging a claim under the Warsaw Convention easily met the test of not being "wholly insubstantial and frivolous." There was no indication that Chubb made the claim solely for the purpose of obtaining jurisdiction. On the contrary, both parties initially believed that the Warsaw Convention governed the dispute.

As in *Bell*, Chubb's right to recover under their complaint would be sustained if a treaty of the United States were given one construction<sup>231</sup> and defeated if it were given another construction.<sup>232</sup> In this case, the fact that Chubb's pleading did not bring it within that class as one entitled to the remedy goes to the sufficiency of the pleading and not to the jurisdiction. Therefore, if the Warsaw Convention was not applicable to international air transport between South Korea and the United States, the court of appeals was entitled only to dismiss the claim as not being one upon which relief can be granted.

Nonetheless, even if the Warsaw Convention claim were dismissed, under *Gibbs* the district court probably had discretion to retain jurisdiction over related claims, whether based on federal or state law. Therefore, the district court had the authority to exercise federal question jurisdiction over *Chubb* even if, as the court of appeals held, there was no treaty relationship between South Korea and the United States.

## 2. Policy Considerations

In drafting the Constitution, one of the framers' central concerns was to ensure that the federal government would enjoy broad control over foreign affairs and trade.<sup>233</sup> Regarding federal court jurisdiction, Alexander Hamilton stated that because "the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."<sup>234</sup> Thus, the

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<sup>231</sup> That is, that a treaty relationship existed.

<sup>232</sup> That is, there was no treaty relationship.

<sup>233</sup> GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 10 (3d ed. 1996).

<sup>234</sup> ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS, No. 80 at 476 (New Am. Library ed. 1961); see 28 U.S.C. § 1332, para. (a)(2) (1994) (providing for "alienage" jurisdiction over civil actions

framers of the Constitution determined that the nation's interests would best be served if cases involving foreign affairs and trade were heard in federal court.<sup>235</sup> The Supreme Court has reiterated this sentiment, pointing out that the Federalist Papers demonstrate the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field."<sup>236</sup>

In stark contrast, the Second Circuit's holding in *Chubb* would discourage plaintiffs from bringing cases with claims under international law in federal court. *Chubb* sends a clear message: short of an explicit holding directly on point from the U.S. Supreme Court, plaintiffs with claims under international law are likely to be forced to refile their disputes in state court after expending considerable time and resources in federal court. The resulting incentive is to bring cases that include uncertain claims based on international law in state court. As a result plaintiffs will be induced to bring the cases that are most likely to determine the future boundaries of international law in state court, rather than in federal court.

## V. CONCLUSION

A thorough review of the customary international law as it applies to treaty interpretation and the amendment of multilateral treaties demonstrates that at the time of the *Chubb* shipment, treaty relations under the Warsaw Convention likely existed between the United States, which adhered only to the original treaty, and South Korea, which adhered only to an amending agreement, the Hague Protocol. In addition, a review of U.S. jurisdictional law indicates that, independent of the outcome of the treaty question, the lower federal courts were vested with federal question subject matter jurisdiction over *Chubb & Son, Inc. v. Asiana Airlines*. Therefore, to the extent that the Second Circuit deviated from this result, the court of appeals' holding in *Chubb* was incorrect.

Articles 31 and 32, taken together with Article 40(5) of the Vienna Convention, suggest that customary international law may bind parties adhering only to an amending agreement with respect to parties adhering only to the original treaty. Moreover, taking subsequent practice into account, South Korea's acquiescence to the U.S. courts' exercise of

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between "citizens of a State and citizens or subjects of a foreign state"). It should be noted that because one party in *Chubb* was a U.S. citizen and the other was a foreign citizen, alienage jurisdiction also attached in this case, independent of the presence of a federal question.

<sup>235</sup> See U.S. CONST., art. III, § 2.

<sup>236</sup> *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9 (1941).

jurisdiction over earlier cases with claims under the Warsaw Convention supports the conclusion that South Korea implicitly consented to the terms of the original Warsaw Convention with respect to the United States.

Furthermore, most scholars have agreed that, at least with regard to the Hague Protocol, adherence to an amending agreement binds a new party to the terms of the original treaty with respect to parties that adhere solely to that treaty. Finally, policy considerations regarding the application of the Warsaw Convention and its progeny favor the presumption that parties adhering to the Hague Protocol without expressly rejecting the Warsaw Convention should be bound to the terms of the original Warsaw Convention with respect to parties that adhere solely to the original treaty.

For these reasons, the court should have found that South Korea was in a treaty relationship with the United States, and therefore should have decided *Chubb* under the original Warsaw Convention. Notwithstanding this conclusion, given the demonstrated ambiguity of Article 40(5) of the Vienna Convention, and the resulting uncertainty regarding the outcome in the factual scenario presented in *Chubb*, the international legal community would be well-advised to revisit this issue—the effect of a new party to a treaty adhering only to an amending agreement—and provide an explicit and nuanced resolution.

Moreover, application of the principles delineated in Supreme Court opinions to *Chubb* compels the conclusion that the lower federal courts were authorized to exercise jurisdiction over this case. Even assuming that treaty relations did not exist between South Korea and the United States, the plaintiff had nonetheless alleged a substantial, nonfrivolous claim under the Warsaw Convention that required the construction of customary international law and a treaty of the United States. Since the outcome in *Chubb* depended on an interpretation of international law, federal question jurisdiction attached. This being the case, the district court had the discretion to hear other claims, whether based on federal or state law, even after the claims under the Warsaw Convention were dismissed.

Quite apart from the influence that these issues of treaty law and subject matter jurisdiction may have on the outcome of *Chubb*, the consequences of the Second Circuit's construction of the customary international law of treaties, and its application of the domestic jurisdictional law may have far-reaching effects. All multilateral treaties, once amended, fall prey to the court of appeals' reasoning. The predictable result threatens the significant progress that has been achieved in the area of international legislation during the past century. Equally disconcerting, as a result of this

opinion the construction of international law may increasingly transpire in state rather than federal court.