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NLRB Jurisdiction over Foreign Governments

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NOTES

NLRB JURISDICTION OVER FOREIGN GOVERNMENTS

I. INTRODUCTION

In *State Bank of India*[1] the National Labor Relations Board[2] reversed its discretionary abstention policy and asserted jurisdiction over the American operations of a foreign government employer.[3] Previously the Board had declined to assert jurisdiction over these employers out of deference to foreign sovereigns, and because of the Supreme Court's admonition against extraterritorial application of the National Labor Relations Act[4] in the absence of "an affirmative intention of the Congress clearly expressed."[5] The Board now believes that neither public policy nor the policies of the NLRA can justify abstention.[6] Although the Board has deemed the recently enacted Foreign Sovereign Immunities Act of 1976[7] (FSIA) inapplicable to its administrative proceedings, it nonetheless believes that the FSIA supports its decision to assert jurisdiction over foreign government employers doing business within the United States.[8]

This paper will analyze the Board's new approach in light of both judicial developments under the NLRA and the Act's legislative history. The FSIA also bears examination to determine its applicability to, and possible effect upon, Board determinations involving foreign government employers. The appropriateness of the Board's decision to assert jurisdiction must ultimately be determined in the context of the policies underlying the Board's earlier abstention, the policies now emphasized by the NLRB, and the concerns of the Congress as reflected in its enactment of the FSIA.

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1. 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977).
2. Hereinafter NLRB or Board.
3. 229 N.L.R.B. at 842-43, 95 L.R.R.M. at 1147.
4. 29 U.S.C. §§ 151-68 (1976) [hereinafter cited as NLRA or Act].
5. Benz v. Compañia Naviera Hidalgo, 353 U.S. 138, 147 (1957).
6. 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.
7. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-11 (1976)) [hereinafter FSIA] [hereinafter references to the FSIA will be to the sections of Title 28 of U.S.C. in which the Act is codified]. The FSIA became effective on January 19, 1977, ninety days from the date it was signed by the President.
8. State Bank of India, 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146; SK Products Corp., 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498, 1500 (1977).

II. STATUTORY JURISDICTION

A. *General Jurisdiction*

In *NLRB v. Jones & Laughlin Steel Corporation*[9] the Supreme Court held that the Commerce Clause of the United States Constitution empowered Congress to regulate the labor relations of employers whose activities affected interstate commerce.[10] Although the Board's jurisdiction extends to all labor disputes affecting interstate commerce,[11] this power[12] has never been fully exercised. The Board has exercised its discretion by declining to assert jurisdiction whenever, in its opinion, assertion of jurisdiction would not effectuate the policies of the NLRA.[13]

Prior to 1959 the courts had occasionally rebuked the Board for failing to assert jurisdiction, notwithstanding the language of section 10(a) of the Act that "empowered," but did not direct, the Board to prevent unfair labor practices.[14] Congress attempted to

9. 301 U.S. 1 (1937).

10. The Court identified the foundation of jurisdiction as "[t]he fundamental principle . . . that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' . . . ." *Id.* at 36-37.

11. The Act defines the term "commerce" as "trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State, Territory, or the District of Columbia . . . ." 29 U.S.C. § 152(6) (1976). The Act defines the term "affecting commerce" as: "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7) (1976).

12. Section 10(a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting commerce," 28 U.S.C. § 160(a) (1976), and section 9 extends the jurisdiction to representation cases where commerce would be affected. *Id.* § 159.

A "labor dispute" is an indispensable prerequisite to NLRB jurisdiction. For example, in NLRB v. International Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964), the court held that the Board lacked jurisdiction over a dispute involving a union's refusal, pursuant to its policy of boycotting ships trading with Cuba, to refer men to a United States employer for work in fitting a British ship in a United States port. The court found that the dispute involved a political question, and was not a labor dispute concerning "terms or conditions of employment." *Id.* at 996.

13. NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951). The Board and the courts have consistently adhered to the principle, expressed in a dissenting opinion in Guss v. Utah, 353 U.S. 1, 13 (1957), that: "The Board is not a court whose jurisdiction over violations of private rights must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act."

14. In Office Employees Local 11 v. NLRB, 353 U.S. 313, 318 (1957), the Court held that "an arbitrary blanket exclusion of union employers as a class is beyond

resolve the issue when it enacted section 14(c)(1) of the Landrum-Griffith Act:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.[15]

After 1959 it is still clear, then, that the NLRB has exclusive *initial* power to decide its jurisdiction.[16] By enacting section 14(c)(1), Congress sanctioned the Board's policy of nonassertion of jurisdiction as to an entire class or category of employers,[17] but prevented the Board from narrowing its jurisdiction by refusing to assert jurisdiction over those employers who were covered under the standards in effect on August 1, 1959. The Fifth Circuit has defined the current standard in the following way: "The extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion, and in the absence of extraordinary circumstances whether jurisdiction should be exercised is for the Board, not the courts, to determine."[18] The case law attests generally to the broad discretion

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the power of the Board." Similarly, in Hotel Employees Local 255 v. Leedom, 358 U.S. 99, 99 (1958), the Court rebuked the Board for its "long standing policy not to exercise jurisdiction over the hotel industry as a class." More recently, in Eugene Good Samaritan Center, 191 N.L.R.B. 35, 77 L.R.R.M. 1412 (1971), in adopting the opinion of its administrative law judge, the Board agreed that it could not decline jurisdiction over an entire industry or class of employees.

15. 29 U.S.C. § 164(c)(1) (1976).

16. In Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938), the Court rejected the theory that the Act was invalid because the Federal Constitution does not empower Congress to vest in an administrative body exclusive power to determine its own jurisdiction. The Court held that the Act did not purport to leave determination of the question wholly to the Board, but merely conferred on the Board exclusive initial power subject to judicial review by the Circuit Courts of Appeals. *See* 29 U.S.C. § 160(a), (f) (1976); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 47 (1937).

17. *But see* Eugene Good Samaritan Center, 191 N.L.R.B. 35, 77 L.R.R.M. 1412; *see* note 14 *supra.*

18. NLRB v. WGOK, 384 F.2d 500, 502 (5th Cir. 1967). It should be noted, however, that the Board may not decline to assert jurisdiction by advisory opinion. Hirsch v. McCulloch, 303 F.2d 208 (D.C. Cir. 1962). *But see* NLRB v.

enjoyed by the Board when it decides whether assertion of jurisdiction would effectuate the purposes and policies of the Act.[19] The FSIA, on the other hand, enumerates constitutional premises for congressional intervention in matters affecting the United States and another sovereign state.[20]

B. *Affecting Commerce Requirement*

Before the Board can assert jurisdiction over an employer's operations his activities must be found to "affect commerce," and the employer must be "engaged in commerce" within the meaning of section 2(6) and (7) of the NLRA.[21] The Supreme Court has given an expansive reading to these two coverage formulas.[22]

In *International Trade Mart,*[23] an early example of the Board's philosophy that foreign commerce is encompassed within the Act's definitions, the Board held that the nonprofit trade mart's operations affected commerce since the employer was organized to pro-

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Wyman-Gordon Co., 394 U.S. 759 (1969).

19. *See, e.g.,* NLRB v. Southwestern Colorado Contractors Ass'n, 379 F.2d 360, 362 (10th Cir. 1967); NLRB v. Harrah's Club, 362 F.2d 425, 427 (9th Cir. 1966), *cert. denied,* 386 U.S. 915 (1967); Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. NLRB, 238 F.2d 38, 39-40 (D.C. Cir. 1956); Pederson v. NLRB, 234 F.2d 417, 419 (2d Cir. 1956).

20. A look at the legislative history of the FSIA reveals that constitutional authority for enacting such legislation derives from:

> the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States" (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1).

H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 12 (1976); S. REP. No. 94-1310, 94th Cong., 2d Sess. 14 (1976). Since the House and Senate Judiciary Committees adopted identical reports, with different pagination, subsequent references will be to the *House Report* [hereinafter COMMITTEE REPORTS]. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); National Bank v. Republic of China, 348 U.S. 356, 370-71 (1955) (Reed, J., dissenting).

21. 29 U.S.C. § 152(6), (7) (1976).

22. *See, e.g.,* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963), where the Court stated that "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." In its first Annual Report, the Board asserted that its jurisdiction was coextensive with congressional power to legislate under the Commerce Clause, a position which was upheld in NLRB v. Fainblatt, 306 U.S. 601 (1939).

23. 87 N.L.R.B. 616, 25 L.R.R.M. 1152 (1949).

mote international trade, and the promotional and sales activities were a direct and important factor in the genesis of commercial transactions involving the shipment of goods in foregin commerce.[24]

In its subsequent *West India Fruit & Steamship Co.*[25] decision, the Board concluded that the provisions of the Act clearly indicated that foreign commerce affecting the United States is a domestic interest. The Board stated that: "The protection or regulation of such commerce involves . . . 'no attempt to act beyond the territorial jurisdiction of the United States', though it may require . . . giving a statute an extraterritorial impact if the statutory policy is to be made effective."[26] Due to the wide support accorded this view in subsequent decisions,[27] the Board's statement in *United Fruit Co.*[28] that the "affecting commerce" clause of the NLRA should not be construed to encompass all commercial transactions touching or concerning the United States and other nations[29] is anomalous. In reaching its decision that the Act is concerned with American commerce and not that of foreign nations,[30] the Board observed that: "[A] foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country."[31] This observation was based upon the Board's "balancing of contacts" approach to maritime jurisdictional questions.[32] On appeal, the Supreme Court clarified its holding in *Benz*

24. *Id.* at 617, 25 L.R.R.M. at 1153.

25. 130 N.L.R.B. 343, 47 L.R.R.M. 1269 (1961).

26. *Id.* at 353, 47 L.R.R.M. at 1273 (footnotes omitted). The Board emphasized the language of the court in United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *aff'd* 341 U.S. 593 (1951), and stated: "[A] general grant of power over foreign commerce, such as in the Labor Act, of necessity includes the authority to reach prohibited acts even though occurring in foreign territory when such acts have a direct effect on trade between the United States and foreign countries." 130 N.L.R.B. at 351, 47 L.R.R.M. at 1272 (footnotes omitted); *see* Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944).

27. *See, e.g.*, NLRB v. International Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964); Freeport Transport, Inc., 220 N.L.R.B. 833, 90 L.R.R.M. 1444 (1975).

28. 134 N.L.R.B. 287, 49 L.R.R.M. 1138 (1961).

29. Despite this language the Board nonetheless concluded that the employer's operations affected commerce, and the Board asserted jurisdiction. *Id. But see* Dalzell Towing Co., 137 N.L.R.B. 427, 50 L.R.R.M. 1164 (1962) (where the Board struck the balance the other way).

30. 134 N.L.R.B. at 288, 49 L.R.R.M. at 1139.

31. *Id.* at 288-89, 49 L.R.R.M. at 1140.

32. The comparison of a vessel's foreign and American contacts arose from the

v. Compañia Naviera Hidalgo,[33] by unequivocally rejecting the "balancing of contacts" theory in determining the applicability of the NLRA to foreign flag ships.[34] This reversal, based upon a rejection of the underlying basis for the Board's statement, casts considerable doubt upon its continued vitality.

Finally, it should be noted that the FSIA,[35] if deemed applicable to NLRB proceedings involving foreign government employers,[36] may have an impact upon the "affecting commerce" requirement of the NLRA. The FSIA leaves intact the present "affecting commerce" standard as to the commercial activities of a foreign government within the United States,[37] and acts which a foreign sovereign performs within the United States in connection with commercial activities elsewhere.[38] The FSIA may, however, alter the standards with respect to acts engaged in by a foreign government outside the United States in connection with commercial activities outside the United States, since it requires that such acts have a "direct effect" in the United States.[39]

C. *Employer Status*

Statutory coverage under the NLRA extends only to the parties defined in section 2 of the Act. Included therein is the Act's definition of an "employer":

Board's decision in Peninsular & Occidental S.S. Co., 120 N.L.R.B. 1097, 42 L.R.R.M. 1113 (1958).

33. 353 U.S. 138 (1957).

34. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 18 (1962).

35. *See* note 7 *supra*.

36. *See* text at notes 108-144 *infra*.

37. 28 U.S.C. § 1605(a)(2) (1976).

38. *Id.*

39. A "direct effect" under the FSIA's "commercial activity" exception may not be the same as a "substantial economic effect" within the meaning of the Commerce Clause. It has been suggested that the FSIA's use of the disjunctive "or" to separate the three clauses of section 1605(a)(2) and the conventional usage of the term "direct effect" suggest that a much lower standard of association with a United States forum would be required in order to subject a foreign government employer to NLRB jurisdiction under the third clause. Note, *Sovereign Immunity*, 18 HARV. INT'L L.J. 429, 437-40 (1977). The legislative history, however, suggests that the requirements for amenability to suit under this clause should be no less stringent than the requirements under the other two. *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., at 31 (1976); *see* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). *But see* note 26 & text accompanying notes 25-31 *supra*.

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . . .[40]

The question arises whether foreign governments are included in the Act's enumerated exceptions to employer status. The responsibility rests with the Board to determine whether a relationship between given parties is that of employer-employee within the meaning of the Act.[41]

Despite the absence of any clear legislative history on the subject,[42] and a permissible interpretation to the contrary based upon the wording of the Act, the Board continues to hold that foreign government corporations do not fit within the "wholly owned Government corporation" exception.[43] Thus, the Board has consistently rejected the argument that foreign governments cannot qualify as employers for purposes of the NLRA. Notwithstanding this holding, however, the Board, prior to its recent policy reversal,[44] had exercised its discretion under section 14(c)(1)[45] to refuse to assert jurisdiction over foreign government employers doing business within the United States.[46]

D. *Legislative History of NLRA*

The leading cases which have consulted the legislative history of the Act to determine whether it applies to employers with foreign contacts and interests have been maritime suits. In *Benz v. Compañia Naviera Hidalgo,*[47] which involved damages resulting from the picketing of a foreign ship operated entirely by foreign seamen

40. 29 U.S.C. § 152(2) (1976).

41. *See, e.g.,* Greyhound Corp., 153 N.L.R.B. 1488, 59 L.R.R.M. 1665 (1965), *enforced,* 368 F.2d 778 (5th Cir. 1966); Deaton Truck Lines, Inc., 143 N.L.R.B. 1372, 53 L.R.R.M. 1497 (1963); Mohican Trucking Co., 131 N.L.R.B. 1174, 48 L.R.R.M. 1213 (1961).

42. The dearth of legislative history on the subject may be due to the fact that Congress never realized that foreign government corporations might one day be made subject to the NLRA. *See* text at notes 47-48 *infra.*

43. SK Products Corp., 95 L.R.R.M. at 1498; State Bank of India, 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144. The Board feels that such a construction is consistent with canons of construction endorsed by the Supreme Court and with the Court's holdings that the boundaries of the Act include "the workingmen of our own country and its possessions." 95 L.R.R.M. at 1500.

44. *See* text at notes 190-221 *infra.*

45. 29 U.S.C. § 164(c)(1) (1976); *see* text at notes 9-20 *supra.*

46. *See* text at notes 162-89 *infra.*

47. 353 U.S. 138 (1957).

under foreign articles while the vessel was temporarily in an American port, the Supreme Court stated:

> Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the lease that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that "the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers." The Report declares further that because of the inadequacies of legislation "the *American* workingman has been deprived of his dignity as an individual," and that it is the purpose of the bill to correct these inadequacies . . . . What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.[48]

Because the dispute in *Benz* involved delicate questions of international relations, the Court felt that it would be inappropriate for the NLRB to interfere, absent "the affirmative intention of the Congress clearly expressed," supporting such interference.[49] Justice Clark, writing for the majority, concluded that only Congress had the facilities necessary to make a fair determination on such an important policy decision, where the possibility of international discord was so great.[50]

The Court reiterated its position in *Benz* in *McCulloch v. Sociedad Nacional de Marineros de Honduras*,[51] where it overturned an NLRB-ordered representation election among the alien seamen of foreign-registered vessels of an American corporation's wholly-owned Honduran subsidiary. The Honduran-flag ships, operating under time-charter to the parent, frequently called at American ports.[52] With respect to the NLRA's legislative history the Court stated:

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48. *Id.* at 143-44.
49. *Id.* at 147.
50. *Id.*
51. 372 U.S. 10 (1962). The case involved a Honduran labor organization which, under Honduran law, was the exclusive bargaining agent for the maritime employees. *Id.* at 11.
52. *Id.*

> We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews.[53]

Despite the absence of any relevant legislative history,[54] two important rules of statutory construction do emerge from the maritime cases. First, as Mr. Chief Justice Marshall admonished in *The Charming Betsy,*[55] "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[56] Second, as the district court aptly stated in its lower court decision in *Sociedad Nacional de Marineros de Honduras v. McCulloch:*[57]

> An Act of Congress, no matter how universal the scope of its terms may be, will ordinarily be confined in its operation and effect to the territorial limits of the United States, unless the contrary intention is clearly and affirmatively expressed.[58]

Under this standard the courts have been loath to enforce other labor statutes when foreign employers are involved where there is a lack of specific congressional intent.[59] For example, in *Sandberg*

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53. *Id.* at 20.

54. The few available remarks on the question of whether Congress in fact exercised its constitutional power to apply the Act to employers with substantial foreign contacts such as foreign-flag vessels in United States waters indicate that only American workingmen were the concern of Congress. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 4, (remarks of Representative Hartley) *reprinted in* [1947] U.S. CODE CONG. SERVICE 135; 75 CONG. REC. 5465 (1932) (remarks of Representative Dyer). *See also* 22 C.F.R. § 81.12 (1977), which provides: "United States citizens employed on foreign vessels . . . have no claim . . . to the special protection, in matters relating to their employment, which the laws of the United States afford seamen employed on vessels of the United States."

55. 6 U.S. (2 Cranch) 64 (1804).

56. *Id.* at 118.

57. 201 F. Supp. 82 (D.D.C. 1962).

58. *Id.* at 89; *see* Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); Jackson v. S.S. Archimedes, 275 U.S. 463, 466-67 (1928); West India Fruit & S.S. Co., 130 N.L.R.B. 343, 349, 47 L.R.R.M. 1269, 1271 (1961).

59. Most cases involve the four interrelated statutes known as the Seamen's Wage Acts: 46 U.S.C. § 594 (1970) (seamen discharged without fault must be paid one month's wages even if not yet earned); 46 U.S.C. § 596 (1970) (provision for immediate payment of seamen after discharge of cargo or seamen); 46 U.S.C. § 597 (1970) (seamen entitled at every port to part of wages earned); 46 U.S.C. § 599 (1970) (wage advances to seamen unlawful). *See also* 8 U.S.C. § 1286 (1976) (illegal to discharge alien seamen in the United States without the approval of the Attorney General).

v. McDonald,[60] the prohibition against making advance payment of wages to foreign seamen was held inapplicable if the advances were made outside the United States, especially where the law of the foreign country sanctioned such contract and payment.[61] The old Eight Hour law governing employment when dealing with government contracts was held inapplicable to work performed in foreign countries,[62] even though the statute referred to "every contract" and apparently intended no exceptions.[63] Finally, the Jones Act,[64] governing the rights of seamen to recover damages for personal injuries occurring in the course of employment, was held inapplicable in *Lauritzen v. Larsen*[65] to a foreign seaman who had been injured while in a foreign harbor.

The Supreme Court's interpretation of the legislative history of the NLRA,the canons of construction developed in the maritime cases, and the reluctance of the courts to give other labor statutes an extraterritorial application, all support the Board's earlier policy of discretionary abstention from asserting jurisdiction over the operations of foreign government employers.

III. Foreign Contact Exemptions

A. *Activities Outside the United States*

In *Pennsylvania Greyhound Lines*[66] the Board held that the policies of the NLRA would not be furthered by assertion of jurisdiction over unfair labor practices allegedly committed by a wholly-owned Canadian subsidiary of Greyhound Bus Lines System, a Delaware corporation.[67] Although the Canadian subsidiary was subject to Interstate Commerce Commission rules and regulations while operating within the United States, the fact that ninety percent of the routes were within Canadian boundaries subjected the corporation to Canadian laws as well.[68] In declining to assert juris-

60. 248 U.S. 185 (1918).
61. *Id.* at 195. *See also* Jackson v. S.S. Archimedes, 275 U.S. 463 (1928).
62. Foley Bros. v. Filardo, 336 U.S. 281 (1949).
63. 40 U.S.C. § 324 (1958), *repealed by* Pub. L. No. 87-581, 76 Stat. 360 (1962), provided that:

> Every contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract . . . shall be required or permitted to work more than 8 hours in any one calendar day upon such work . . . .

64. Merchant Marine (Jones) Act of 1920, § 33, 46 U.S.C. § 688 (1970).
65. 345 U.S. 571 (1953).
66. 13 N.L.R.B. 28, 4 L.R.R.M. 268 (1939).
67. *Id.* at 32, 4 L.R.R.M. at 268.
68. *Id.* at 31, 4 L.R.R.M. at 268.

diction, the Board stressed the potential conflict of laws that might otherwise result.[69] This concern appears to be particularly significant in transactions involving foreign government employers.

In *Detroit & Canada Tunnel Corp.*[70] the NLRB held that employees who worked exclusively in Canada should be exluded from the bargaining unit of a domestic vehicular tunnel and busline company and its Canadian subsidiary.[71] In view of the integration of the employer's total operations and the bargaining history, the NLRB would ordinarily have found that all the employees, including those working exclusively in Canada, constituted a single unit.[72] The Board premised this exceptional result upon the generally accepted principle of international law that one government is precluded from exercising administrative functions within the territory of another government.[73] Again, this rule seems to have particular importance where foreign government employers are involved, even when they operate within the United States, since the employer's labor relations policies and decisions may be formulated outside the United States.

In *Grain Elevator, Flour & Feed Mill Workers, Local 418 v. NLRB,*[74] the District of Columbia Court of Appeals held that the NLRB had jurisdiction over the secondary boycott activities of an American employer even though the primary dispute involved the internal affairs of a Canadian employer and a Canadian union.[75] Because the activity was characterized as occurring primarily within and affecting the United States,[76] the decision is consistent with earlier Board precedent.

Recent Board decisions have consistently declined to assert jurisdiction over American employees performing work outside the United States. In *RCA OMS, Inc.,*[77] the Board held that it had no

69. Under Canadian law the subsidiary was compelled to employ only Canadian citizens as drivers and could use only Canadian-owned buses. *Id.*

70. 83 N.L.R.B. 727, 24 L.R.R.M. 1141 (1949).

71. *Id.* at 731-32, 24 L.R.R.M. at 1142.

72. *Id.* at 731, 24 L.R.R.M. at 1142.

73. *Id.* at 732 & n.10, 24 L.R.R.M. at 1142. The Board also noted that the exclusion of the employees working exclusively in Canada avoided any possible conflict with the administration of the Industrial Relations and Disputes Investigations Act of the Dominion of Canada and the corresponding labor legislation of the Province of Ontario. *Id.* at 732 & n.11, 24 L.R.R.M. at 1142. *But see* West India Fruit & S.S. Co., 130 N.L.R.B. at 353 & n.30, 47 L.R.R.M. at 1273 & n.30.

74. 376 F.2d 774 (D.C. Cir. 1967).

75. *Id.* at 776.

76. *Id.*

77. 202 N.L.R.B. 228, 82 L.R.R.M. 1531 (1973).

statutory jurisdiction over an employer who, pursuant to a contract with the United States government, operated five Distant Early Warning sites in Greenland.[78] The employees whom the union sought to represent were hired in the United States, paid from the United States, and, upon completion of their jobs, returned to their original hiring locations in the United States.[79] Nevertheless, the Board found that since the unit sought to be represented was located in Greenland, a Danish possession and operated as a county of that country, the Board could not assert jurisdiction.[80]

Similarly, in *GTE Automatic Electric Inc.*,[81] the Board, in delineating a unit of telephone equipment installers, excluded those employees working on projects in Iran and other foreign nations. The Board held that the employees working outside the United States were not within the jurisdiction of the Act.[82] In his concurrence, Member Jenkins drew a distinction between temporarily and permanently assigned workers. He would not have excluded

78. *Id.* at 228, 82 L.R.R.M. at 1532.

79. *Id.* In a similar decision the Board refused to assert jurisdiction over a company that hired commercial airline pilots, navigators, and flight engineers and then subcontracted out their services to foreign airlines. International Air Service Co., 216 N.L.R.B. 782, 88 L.R.R.M. 1337 (1975); *see* text at notes 176-183 *infra*. Despite the fact that petitioner's unit would have included only flight crews flying out of Anchorage, Alaska, jurisdiction was declined because the flight personnel flew Japan Air Lines (JAL) planes, over JAL routes, on JAL schedules, all under the direction and control of JAL personnel. Significantly, the Board agreed that the employer was exempt from the Act as "intimately related to" an agency of a foreign government and as a foreign-flag carrier. 216 N.L.R.B. at 784, 88 L.R.R.M. at 1339; *see* International In-Flight Catering Co., 209 N.L.R.B. 444, 85 L.R.R.M. 1364 (1974).

80. 202 N.L.R.B. at 228, 82 L.R.R.M. at 1532.

81. 226 N.L.R.B. 1222, 93 L.R.R.M. 1449 (1976).

82. *Id.* at 1223, 93 L.R.R.M. at 1449-50. Even if the Board has statutory jurisdiction it may choose not to assert it because of other factors such as the lack of local permanent residents, remoteness and difficulty of access. *See, e.g.*, Facilities Management Corp., 202 N.L.R.B. 1144, 82 L.R.R.M. 1778 (1973) (the Board declined to assert jurisdiction over maintenance employees working on a military installation on Wake Island). *But see* Van Camp Sea Food Co., 212 N.L.R.B. 537, 86 L.R.R.M. 1573 (1974). In *Van Camp*, the Board reversed its earlier decision in Star-Kist Samoa, Inc., 172 N.L.R.B. 1467, 68 L.R.R.M. 1532 (1968), and held that it had statutory jurisdiction over representation and unfair labor practice proceedings arising in American Samoa, even though taking jurisdiction over that island would require additional appropriations and create administrative difficulties.

American employees on temporary assignment in foreign countries from the bargaining unit.[83]

The recent Board cases indicate a strong policy against asserting jurisdiction over American employees performing work outside the United States. The policy is founded upon a strong desire to have only one sovereign dictating the labor laws governing the employer-employee relationship, a concern which is particularly great with respect to employees working for foreign governments outside the United States. The need to have one sovereign determine labor conditions and standards also supports a policy of deference to foreign government employers doing business within the United States, even where the employees are American citizens.

B. *Foreign National Employees*

In *Scott Paper Company*[84] the Board directed an election among the Canadian employees of American lumber camps, holding that the certain minimal standards in wages, housing, and transportation required before an employer could bring in Canadian employees under bond did not prohibit collective bargaining to raise the standards or to encompass other terms and conditions of employment.[85] Similarly, in *Clare, C.P. & Co.*,[86] the NLRB held that it had jurisdiction over proceedings resulting from union efforts to represent warehouse employees working in Arizona, despite the claim that the employees were foreign nationals employed by a Mexican corporation.[87] The Board found that in fact the employees were employed within the United States under special work permits by the Mexican corporation's American parent company over which the NLRB had jurisdiction.

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83. Jenkins would include temporarily assigned workers in the unit because they:

> retain many interests in the conditions of employment in the United States. There was testimony indicating they are on layoff status while on temporary assignment and, in this respect, they clearly remain members of the bargaining unit. They are entitled to bargaining representation with respect to such matters as the terms of their transfer to foreign countries, their retention of seniority rights, their rights to be returned to the United States, and their reemployment rights. The fact that the employer need not bargain about the terms and conditions of their employment in Iran hardly relieves it of the duty to bargain about such other matters as those mentioned.

226 N.L.R.B. at 1223 n.2, 93 L.R.R.M. at 1450 n.2.

84. 171 N.L.R.B. 821, 68 L.R.R.M. 1164 (1968).

85. *Id.* at 823, 68 L.R.R.M. at 1166.

86. 191 N.L.R.B. 589, 77 L.R.R.M. 1535 (1971).

87. *Id.* at 590, 77 L.R.R.M. at 1536-37; *see* Great Northern Paper Co., 171 N.L.R.B. 824, 68 L.R.R.M. 1167 (1968); Brown, Co., 109 N.L.R.B. 173 (1954).

These decisions suggest that the Board is reluctant to relinquish its statutory authority merely because a domestic corporation employs foreign nationals.[88] In fact, the Board has stated unequivocally that the Act "does not differentiate between citizens and non-citizens," and in order to effectuate the purposes of the Act, the Board feels that no such distinction should be drawn.[89] The few instances where the Board has declined to assert jurisdiction because of the presence of foreign nationals as employees are arguably confined to their facts, since the cases have arisen in the Panama Canal Zone, an extremely delicate area of international concern.[90] Thus, under Board precedent, the presence of foreign national employees should not bar assertion of jurisdiction over foreign government employers. Nonetheless, where the foreign nationals are citizens of the foreign sovereign employing them, their natural loyalties and allegiance to the foreign sovereign could provide an obstacle to the Board's administration of the NLRA, which would support a discretionary abstention by the NLRB.

C. *The Maritime Cases*

The policy of deference to foreign sovereigns over labor relations policies has evolved primarily in maritime decisions.[91] As noted above, moreover, these cases have been responsible for most of the judicial inspection of the legislative history of the NLRA on the issue of extraterritorial application.[92] The central lesson that has

88. Italia Societa per Axioni di Navigazione, 118 N.L.R.B. 1113, 40 L.R.R.M. 1336 (1957), represents another instance where the Board has asserted jurisdiction over the operations of a foreign corporation located within the United States despite the presence of alien employees. *See also* Compagnie Generale Transatlantique, 118 N.L.R.B. 1327, 40 L.R.R.M. 1367 (1957); Delta Match Corp., 102 N.L.R.B. 1400, 31 L.R.R.M. 1464 (1953).

89. Dan Logan, 55 N.L.R.B. 310, 315 n.12, 14 L.R.R.M. 20, 20 (1944); *see* West India Fruit & S.S. Co., 130 N.L.R.B. at 361, 47 L.R.R.M. at 1276-77.

90. Contract Serv., Inc., 202 N.L.R.B. 862, 82 L.R.R.M. 1757 (1973). The Board first found that it had statutory jurisdiction over an employer that employed Panamanian nationals and was engaged in bus transportation of United States military dependents to and from school within the Panama Canal Zone. In the exercise of its discretion, however, the Board declined to assert jurisdiction due primarily to foreign policy considerations since such action might adversely affect United States-Panamanian relations. *Accord,* United Fruit Co., 159 N.L.R.B. 135, 62 L.R.R.M. 1263 (1966); *see* SK Products Corp., 95 L.R.R.M. 1498, 1501 n.15 (1977).

91. *See, e.g.,* McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1962); Benz v. Compañia Naviera Hidalgo, 353 U.S. 138 (1957); West India Fruit & S.S. Co., 130 N.L.R.B. 343.

92. *See* text at notes 47-65 *supra.*

emerged is that an "affirmative intention of the Congress clearly expressed" must exist before the Court will sanction the exercise of local American sovereignty in the field of international relations.[93] This standard should apply with full force to inclusion of foreign government employers under the NLRA due to the general absence of any guiding legislative intent.[94]

In *McCulloch v. Sociedad Nacional de Marineros,*[95] the Supreme Court was faced with a potential conflict of laws of two sovereigns.[96] Approval of Board jurisdiction would have displaced a Honduran labor union which, under Honduran law, was the exclusive bargaining agent of the employees, with an American labor organization. The Court emphasized that "[t]he possibility of international discord" was a paramount consideration and could not be dismissed lightly.[97] *McCulloch* is thus strong authority for general deference to foreign sovereigns in administrative matters of internal concern.[98]

The courts have likewise been very reluctant to approve of NLRB jurisdiction when the only American connection to a maritime dispute is that it arose while the vessel was transiently in an American port.[99] There is concern that, if a nation exploited its international maritime contacts to the limit of its power in order to serve some immediate interest, "a multiplicity of conflicting and overlapping burdens . . . would blight international carriage by sea."[100] This warning applies with equal vigor to the operations of foreign government employers.

D. *The Federal Preemption Analogy*

The problems posed by the interaction of labor laws of the United States and those of foreign nations are similar to the problems encountered under the federal preemption doctrine. The

93. McCulloch v. Sociedad Nacional de Marineros, 372 U.S. at 21-22 (quoting Benz v. Compañia Naviera Hidalgo, 353 U.S. at 147).

94. *See* note 42 *supra. See also* State Bank of India, 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144-45.

95. 372 U.S. 10 (1962).

96. *Id.* at 19-21. The Court felt that enforcement of the Board order "would inevitably lead to embarassment in foreign affairs and be entirely infeasible in actual practice." *Id.* at 19.

97. *Id.* at 21.

98. *Id.*

99. *See, e.g.,* Benz v. Compañia Naviera Hidalgo, 353 U.S. 138, 146-47; Navios Corp. v. National Maritime Union, 359 F.2d 853 (3d Cir. 1966), *cert. denied,* 385 U.S. 900 (1966).

100. Lauritzen v. Larsen, 345 U.S. 571, 581 (1953).

preemption cases are founded upon the principle that, due to the essentially integrated character of labor relations, only one jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single unit.[101] The potential for conflict stemming from dual regulation of labor relations is even greater when the conflict is between the laws of two sovereign nations.[102]

Although the federal preemption doctrine may operate to disallow the states from imposing their own regulations on the labor relations of foreign corporations, the maritime cases have tended to permit state regulation.[103] The inapplicability of federal legislation does not wholly negate federal preemption; the states may still be precluded from regulating in this area by the paramount federal power over foreign commerce[104] and foreign relations.[105]

The necessity for application of only one set of governmental labor policies is equally strong whether the interaction is between the United States and one of its States or between the United States and a foreign sovereign.

IV. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Congress enacted the Foreign Sovereign Immunities Act of 1976[106] in the hope that it would eliminate inconsistent determinations of sovereign immunity.[107] The FSIA seeks basically to remove sovereign immunity as a bar to United States federal or state court jurisdiction in suits against foreign governments engaged in commercial activities within the United States.[108]

101. *See, e.g.*, UMW v. Arkansas Flooring Co., 351 U.S. 62 (1956); Weber v. Anheuser-Busch Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, 346 U.S. 485 (1953); La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18, 25 (1949) (dual regulation is "fraught with potential conflict").

102. *See* Lauritzen v. Larsen, 345 U.S. 571, 581 (1953).

103. *See, e.g.*, Incres S.S. Co. v. Maritime Workers, 372 U.S. 24 (1963); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960); Benz v. Compañia Naviera Hidalgo, 353 U.S. 138.

104. *Cf.* Pryce v. Swedish-American Lines, 30 F. Supp. 371 (S.D.N.Y. 1939) (holding that construction of state civil rights law to apply to common carriers engaged in foreign commerce would illegally interfere with foreign commerce); *but cf.* Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (holding that application of state civil rights act to person engaged in foreign commerce did not violate the Commerce Clause).

105. *Cf.* United States v. Pink, 315 U.S. 203 (1942) (stating that state law must yield to a treaty with which it is inconsistent).

106. *See* note 7 *supra*.

107. COMMITTEE REPORTS, *supra* note 20, at 7.

108. *See* 28 U.S.C. §§ 1330(a), 1602, 1605(a)(2) (1976).

A. *Applicability to NLRB Proceedings*

The first question presented is whether the FSIA applies to NLRB proceedings involving foreign government employers doing business within the United States. Section 1602, which defines the purposes of the FSIA, emphasizes the need for judicial determinations of questions concerning immunity.[109] Section 1330(a) translates this concern into a comprehensive jurisdictional scheme for suits in American courts involving foreign sovereigns.[110] The broad scope intended by the Congress is reflected in the legislative history which states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by the foreign states before Federal and State courts in the United States."[111] Thus, the major focus of the FSIA is upon providing a consistent approach to, and resolution of, sovereign immunity questions arising in American court litigation.[112] Neither the FSIA nor its legislative history mentions administrative agency proceedings. The Board has seized upon this fact as evidence that the FSIA is inapplicable to its adjudications.[113] The principal ad-

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109. *Id.* § 1602.

110. *Id.* § 1330(a). The legislative history states that the purpose of the FSIA is "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." COMMITTEE REPORTS, *supra* note 20, at 6.

111. COMMITTEE REPORTS, *supra* note 20, at 12.

112. In addition to setting forth comprehensive rules governing sovereign immunity, the FSIA establishes:

> the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Id.

113. In SK Products Corp., 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498, 1500 (1977), the Board held that the FSIA did not require it to modify its established policy of refraining from exercising jurisdiction over domestic firms wholly owned or closely related to foreign governments or their instrumentalities. The Board apparently approved of the employer's argument that enactment of the FSIA "is limited to granting Federal and State courts jurisdiction over foreign states or their instrumentalities in connection with 'a commercial activity carried on in the United States by [a] foreign state,' and does not purport to extend or expand the authority of administrative agencies." *Id.* Similarly, in State Bank of India, 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977), the Board stated that:

> While we recognize that the Foreign Sovereign Immunities Act of 1976 affects judicial, not administrative, determinations of rights growing out of such activities, we believe that it is further support of our decision to treat

vantage to this interpretation is that it avoids any conflict between the vesting of original jurisdiction in the federal district courts to determine questions of sovereign immunity[114] and the NLRB's exclusive jurisdiction under the NLRA over unfair labor practice charges[115] and representation elections[116] involving employers[117] whose activities affect commerce.[118]

There are, however, compelling arguments for holding the FSIA applicable to NLRB proceedings involving foreign government employers. The legislative history provides strong indication that the provisions of the FSIA were intended to cover labor disputes involving foreign government employers. First, the legislative history states that the "employment or engagement of laborers, clerical staff or public relations or marketing agents" by a foreign government fits within the definition of "commercial activity" under the FSIA.[119] Second, as a type of situation that might be included within the definition "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . . ,"[120] the legislative history sets out the following example: "the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country."[121] The third and most persuasive indication that the Congress intended the

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foreign state enterprises coming within our jurisdiction as we would private individuals under like circumstances.

Id. at 842, 95 L.R.R.M. at 1146.

114. 28 U.S.C. §§ 1330(a), 1602 (1976).

115. Under section 10(a) of the Labor Management Relations Act, "the Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." 29 U.S.C. § 160(a) (1976). "Prior to 1947, the section read: 'This power shall be exclusive, and shall not be affected by any other means of adjustment.'" THE DEVELOPING LABOR LAW 441 (C. Morris ed. 1971). The Taft-Hartley amendments removed the words "shall be exclusive, and" and substituted in their place a proviso empowering the Board to cede jurisdiction to a state or territorial agency under certain conditions. *Id.* The NLRB thus "has exclusive and primary jurisdiction over the adjudication of unfair labor practices, except where it cedes jurisdiction as provided in section 10(a) or declines jurisdiction as provided in section 14(c). The Board has never concluded a cession agreement with a state agency." *Id.*

116. 29 U.S.C. § 159(b)-(c)(1) (1976).

117. *See* text at notes 40-46 *supra.*

118. *See* text at notes 21-46 *supra.*

119. COMMITTEE REPORTS, *supra* note 20, at 16.

120. 28 U.S.C. § 1605(a)(2) (1976).

121. COMMITTEE REPORTS, *supra* note 20, at 19.

FSIA to touch the foreign government employer-employee relationship is the following statement in the legislative history: "public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States."[122] These three examples suggest that Congress contemplated application of the FSIA to labor controversies involving foreign government employers, resulting in the denial of sovereign immunity protection when the employer is engaged in "commercial activities."[123]

There are also practical reasons for finding that the FSIA applies to NLRB proceedings. When a party seeks judicial review or enforcement of a Board order in the appropriate United States court of appeals,[124] the issue of the applicability of the FSIA to foreign government employers will surface again.[125] An argument can be constructed that the FSIA is concerned only with matters originally cognizable in the federal or state courts and thus should not be read to extend to appellate review of adminstrative agency actions.[126] The appellate courts would be required to abdicate the resolution of foreign sovereign immunity questions to the NLRB, contravening the basic purpose of the FSIA: to transfer foreign sovereign immunity determinations from the executive branch to the judicial branch[127] by providing "the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States."[128] Thus, it appears inescapable that, even if the FSIA does not apply at the initial NLRB stage, it must apply when the lawsuit reaches a United States court of appeals.

An arrangement under which the Board does not apply the FSIA would require the circuit courts to make de novo determinations of sovereign immunity questions involving foreign government employers. Such a procedure would have serious drawbacks. A

122. *Id.* at 16.

123. *See* text accompanying notes 155-57 *supra.*

124. Pursuant to 29 U.S.C. § 160(f) (1976).

125. *See* 28 U.S.C. §§ 1330(a), 1602 (1976); COMMITTEE REPORTS, *supra* note 20, at 12.

126. *See* 28 U.S.C. § 1330(a) (1976); notes 110-12 & accompanying text *supra.*

127. *See* 28 U.S.C. § 1602 (1976). The Congress felt that such a transfer would reduce the foreign policy implications of immunity determinations and would assure litigants "that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." COMMITTEE REPORTS, *supra* note 20, at 7.

128. COMMITTEE REPORTS, *supra* note 20, at 12.

disgruntled litigant would be encouraged to disregard the Board order or decision and to seek judicial review under section 10(f) of the NLRA[129] in the hope that resolution of the sovereign immunity issue under the FSIA by the court of appeals might mandate an opposite result. This would defeat the purposes and policies of the NLRA to provide a speedy resolution of labor disputes[130] by further delaying a final disposition of the controversy. Such an approach would also increase the burden on the federal courts by encouraging further resort to these tribunals.

A bifurcated system would inhibit the development of Board expertise in application of the FSIA. The NLRB's recent decisions in *State Bank of India*[131] and *SK Products Corp.*,[132] in which it considered the possible outcome under the FSIA even though finding it to be inapplicable, attest to the Board's willingness and ability to engage in such analysis.[133] Moreover, the Board has had a wealth of experience in deciding closely analogous questions under the political subdivision[134] and United States government employer[135] exemptions of the NLRA. This is particularly true with respect to differentiations between traditional governmental functions to which exemption attaches and private commercial activities for which there is no exemption.[136] The development of Board expertise in the application of the FSIA would discourage disrespect of Board orders by disgruntled litigants, since the courts of

129. 29 U.S.C. § 160(f) (1976).

130. *See generally* 29 U.S.C. § 151 (1976).

131. 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977).

132. 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498 (1977).

133. SK Products Corp., 95 L.R.R.M. at 1500-01; State Bank of India, 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.

134. 29 U.S.C. § 152 (1976).

135. *Id.*

136. *See, e.g.*, California Inspection Rating Bureau, 231 N.L.R.B. No. 75, 96 L.R.R.M. 1127 (1977), *enforcing* 225 N.L.R.B. 870, 93 L.R.R.M. 1192 (1976), in which the Board rejected the employer's argument that merely because the function or service is mandated by state statutes it "per se" becomes intimately connected with the state and is thereby exempted from NLRB jurisdiction. Rather, the appropriate approach is an examination of all the factors including the nature of the functions which have been mandated by the state to determine whether the activities concern "traditional essential governmental functions as distinguished from commercial operations." 96 L.R.R.M. at 1128.

The Board concluded that the insurance rating activities were similar to the commercial operations of private sector enterprises and were not universally recognized, traditional governmental functions. *Id.* The Board's emphasis upon the nature rather than the purpose of the activities is identical to the approach adopted by the FSIA. *See* text at note 154 *infra.*

appeals would probably be more inclined to defer to Board determinations concerning the FSIA.

Finally, it should be noted that state[137] or federal court suits brought under section 301 of the NLRA[138] to enforce collective bargaining agreements[139] would also raise foreign sovereign immunity questions which might give rise to the following anomalous situation: The Board would find that the FSIA was inapplicable to the representation campaign[140] and in the event of a victory by the prospective bargaining representative, the latter would be certified.[141] After negotiation of a collective bargaining agreement, a suit, such as to compel arbitration, might arise under section 301 of the NLRA. The state court or federal district court could conceivably conclude that the FSIA afforded the foreign government employer sovereign immunity,[142] thus depriving the court of jurisdiction and leaving the bargaining agent remediless.[143] The situation would be obviated were the Board to make a determination under the FSIA at the outset to which the courts would be required to give some deference.[144]

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137. In Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the Supreme Court held that state courts have concurrent jurisdiction with the federal courts over suits brought under section 301. The Court noted that under section 301 suits "may" be brought in the federal district courts, not that they must be. *Id.* at 506. According to the Court "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Id.* at 507.

138. Section 301 of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1976).

139. The case law has securely established that the courts have jurisdiction over suits involving collective bargaining agreements brought under section 301 even though the conduct may arguably be subject to the provisions of the NLRA. Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502.

140. As it did in SK Products Corp., 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498 and State Bank of India, 229 N.L.R.B. 838, 95 L.R.R.M. 1141.

141. Under section 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1) (1976).

142. Such a finding would be unlikely. *See* text at notes 145-49 *infra.*

143. If the foreign government employer were afforded sovereign immunity protection it would be exempt from the provisions of the NLRA and could conduct its labor relations policies without intervention by the United States Government.

144. Section 10(e) of the NLRA states that "[t]he findings of the Board with respect to questions of fact, if supported by substantial evidence on the record

B. *Effect Upon Board Determinations*

If the FSIA is deemed applicable to NLRB proceedings, the next question becomes whether it affords foreign government employers any sovereign immunity protection. The FSIA's exceptions discussed below appear to preclude sovereign immunity treatment in the vast majority of instances. Only in the rare cases where none of the exceptions applies would sovereign immunity attach.

1. The Section 1332(c) Citizenship Exception

The FSIA defines a "foreign state" broadly as any political subdivision of a foreign state or any agency or instrumentality of a foreign state.[145] An "agency or instrumentality of a foreign state," in turn, includes any entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.[146]

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considered as a whole, shall be conclusive." 29 U.S.C. § 160(e) (1976). This standard has been interpreted by the Supreme Court as requiring that agency determinations of questions of fact be accorded strong deference. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-90 (1951).

The courts are free to substitute their judgment for that of the Board on questions of law if it appears that the Board was in error in its interpretation of the NLRA. NLRB v. Denver Bldg. and Constr. Trades Council, 341 U.S. 675 (1951); NLRB v. Radio & Television Broadcast Engineers Union, 364 U.S. 573 (1961). Nonetheless, due to the Board's special duty to administer the NLRA, courts must give appropriate weight to the judgment of the Board as to the proper interpretation. NLRB v. Hearst Publications, 322 U.S. 111 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

Because Congress has primarily entrusted administration of the FSIA to the federal and state courts the deference that would be due Board determinations is an open question. *See* 28 U.S.C. § 1330(a) (1976). A standard similar to that followed under the NLRA would provide the benefit of increased respect for NLRB determinations. The Board's expertise in resolving issues similar to those presented under the FSIA further supports application of the standard of deference traditionally accorded Board determinations of questions of law under the NLRA. *See* note 136 *supra.*

145. 28 U.S.C. § 1603(a) (1976).

146. 28 U.S.C. § 1603(b) (1976). By becoming a stockholder in a corporation licensed to do business in the United States the foreign state consents to the corporation being treated under United States laws as a citizen of the state of incorporation or principal place of business. *See* SK Products Corp., 95 L.R.R.M.

By excluding entities which are citizens of the United States as defined in 28 U.S.C. sections 1332(c) and (d),[147] section 1603(b)(3) of the FSIA carves out a major exception. The legislative history cites as an example of section 1603(b)(3) entities a corporation organized under the laws of the State of New York but owned by a foreign state.[148] The rationale for this exclusion is that "if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature."[149]

2. The Commercial Activity Exception

The FSIA denies sovereign immunity to foreign governments when they engage in commercial activity within the United States, or perform an act within the United States in connection with a commercial activity elsewhere, or engage in an act outside the United States, in connection with a commercial activity outside the United States, that causes a direct effect in the United States.[150] The FSIA defines "commercial activity" as:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[151]

The FSIA thus adopts a restrictive theory of sovereign immun-

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at 1500-01. *See also* Schenley Distillers Corp. v. United States (ICC), 326 U.S. 432, 437 (1946); Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934). Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision. COMMITTEE REPORTS, *supra* note 20, at 15; *see* Hannes v. Kingdom of Roumania Monopolies Inst., 260 App. Div. 189, 24 N.Y.S.2d 994, *order resettled,* 260 App. Div. 1058, 26 N.Y.S.2d 856 (1940); Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566,* 8 INT'L L. 408, 409 (1974).

147. Under 28 U.S.C. § 1332(c) (1976) a corporation is "deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(d) (1976) defines the word "state" to include the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

148. COMMITTEE REPORTS, *supra* note 20, at 15; *see* Amtorg Trading Corp. v. United States, 71 F.2d 524.

149. COMMITTEE REPORTS, *supra* note 20, at 15.

150. 28 U.S.C. § 1605(a)(2) (1976).

151. *Id.* § 1603(d).

ity.[152] Immunity exists when foreign states engage in public acts (jure imperii), but not when they engage in commercial or private acts (jure gestionis).[153] The reference in section 1603(d) to the nature rather than the purpose of the activity may have the greatest effect upon non-market economies in which nearly all trading activities might be considered to have a public purpose.[154]

As mentioned above, the legislative history of the FSIA provides strong evidence of a congressional intent to include the labor relations of foreign government employers within the scope of the FSIA.[155] Most employment controversies would be subsumed within the "commercial activity" exception.[156] Under the congressional scheme sovereign immunity would only attach to the employment of diplomatic, civil service, or military personnel.[157]

3. The Waiver Doctrine

The FSIA states that a foreign state shall not be immune where it has waived its immunity either explicitly or implicitly.[158] A foreign state can renounce its immunity explicitly by treaty[159] or waive the defense implicitly by agreeing to arbitration in another country.[160] An implicit waiver would also occur if a foreign state filed a responsive pleading in an action without raising the defense of sovereign immunity.[161]

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152. First developed in a letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952). The absolute theory of sovereign immunity was stated in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), involving efforts by the creditors of a ship to attach it.

153. *See* COMMITTEE REPORTS, *supra* note 20, at 8. The *gestionis-imperii* distinction was first recognized by an American court in Hannes v. Kingdom of Roumania Monopolies Inst., 260 App. Div. 189, 24 N.Y.S.2d 994, *order resettled,* 260 App. Div. 1058, 26 N.Y.S.2d 856 (1940).

154. Note, *Sovereign Immunity,* 18 HARV. INT'L L.J. 429, 438 (1977). *See also* Fensterwald, *Sovereign Immunity and Soviet State Trading,* 63 HARV. L. REV. 614 (1950); Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception,* 56 NW. U. L. REV. 109 (1961).

155. *See* text accompanying notes 119-23 *supra.*

156. *Id.*

157. COMMITTEE REPORTS, *supra* note 20, at 16.

158. 28 U.S.C. § 1605(a)(1) (1976).

159. COMMITTEE REPORTS, *supra* note 20, at 18.

160. *Id.*

161. *Id.*

V. Foreign Government Employers

A. *Board Precedent*

In *British Rail-International, Inc.*,[162] the Board declined to assert jurisdiction over an employer engaged in selling British railway tickets and vouchers within the United States for rail travel in Britain because of the employer's close relationship with the British Railways Board, an agency of the British government.[163] The employer argued that the Board did not have jurisdiction, or, in the alternative, should not assert jurisdiction, over a wholly-owned subsidiary of a foreign government.[164] Without ever addressing the question of whether it had statutory jurisdiction over the employer's operation, the Board exercised its discretion to dismiss the union's representation petition.[165] In declining to assert jurisdiction, the NLRB placed particular emphasis upon the employer's close relationship with an agency of the British government.[166]

In a later representation campaign involving the same union,[167] the Board again declined to assert jurisdiction[168] because of the close relationship between the employer, AGIP, USA, Inc., and Ente Nationale Idrocarburi (ENI), an arm of the Italian government headed by a cabinet minister appointed by the Government in power.[169] AGIP's primary purpose was to assist in the purchase of American equipment and materials for ENI's energy procurement and development projects.[170] In exercising its discretion not to assert jurisdiction the NLRB again emphasized the employer's

162. 163 N.L.R.B. 721, 64 L.R.R.M. 1432 (1967).

163. *Id.* at 721, 64 L.R.R.M. at 1432.

164. *Id.*

165. *Id.* at 722, 64 L.R.R.M. at 1432. The Board did mention in passing that although the day-to-day operations of the employer were administered by officials in the United States, overall policy directives regarding labor relations and personnel policies emanated from London. *Id.*

166. *Id.* at 721-22, 64 L.R.R.M. at 1433. All of the employer's stock was owned by the British Railways Board (BRB), an agency of the Ministry of Transport of the United Kingdom. All of the employer's members of the Board of Directors were appointed by the BRB. Of the three members residing in the United States, none had managerial responsibility and all policy matters were transferred to the three London directors for decision.

167. The Office & Professional Employees International Union, Local 153, AFL-CIO.

168. AGIP, USA, Inc., 196 N.L.R.B. 1144, 80 L.R.R.M. 1245 (1972).

169. *Id.*

170. ENI was established for the purpose of producing energy from gas, oil, coal and nuclear power for Italy's use. The world-wide ENI complex included some 200 companies.

close relationship with a foreign government.[171]

Member Fanning dissented in *AGIP, USA, Inc.*[172] He suggested that *British Rail* could be distinguished on the ground that a substantial number of its employees were British nationals, whereas *AGIP* involved only American employees.[173] Fanning relied in part upon the presence of American employees in *AGIP* to bolster his textual analysis of section 2(2) of the NLRA that "even assuming the word "Government" used in Section 2(2) includes foreign governments, it is apparent that the Employer does not qualify for the exemption given such employers."[174] Fanning thus recognized an exception to the Board's general rule of deference to foreign government employers and would have asserted jurisdiction whenever the employees were primarily United States citizens.[175]

In *International Air Service Co.*,[176] a Board panel[177] declined to assert jurisdiction, acting again upon the principle of deference to foreign sovereigns. The Pilot Safety Association sought a unit comprised of International Air Service Company (IASCO) flight crews contracted to Japan Air Lines (JAL) flying out of Anchorage, Alaska. The Board held that assertion of jurisdiction would be inappropriate because IASCO's services were intimately connected[178] with the exempted operations of JAL.[179] The nexus be-

171. 196 N.L.R.B. at 1144, 80 L.R.R.M. at 1245. The record indicated, in effect, a parent-subsidiary relationship between ENI and the employer. ENI had financial control over the employer's operations by virtue of its ownership of approximately 97 percent of AGIP's corporate shares. ENI also exercised control over the appointment of AGIP's corporate officers and directors. Testimony revealed that all labor relations policy for ENI companies, including AGIP, was established in Italy.

172. *Id.* at 1145, 80 L.R.R.M. at 1246.

173. *Id.* at 1145 n.3, 80 L.R.R.M. at 1246 n.3. Both *British Rail* and *AGIP* were decided by three-member Board Panels. Fanning participated only in *AGIP*.

174. *Id.* at 1145, 80 L.R.R.M. at 1246; *see* text accompanying notes 40-46 *supra*.

175. As the question was not presented in *AGIP* Fanning did not need to consider whether differing workforce compositions of alien and American employees would affect the outcome. Instead, Fanning repeated the remarks of Representative Hartley that the NLRA, as amended, was intended to be a "bill of rights both for American workingmen and their employers." 196 N.L.R.B. at 1145, 80 L.R.R.M. at 1246; *see* text accompanying notes 47-48 *supra*.

176. 216 N.L.R.B. 782, 88 L.R.R.M. 1337 (1975).

177. Member Fanning who dissented in *AGIP* again did not participate on the Board Panel.

178. Under its contract with JAL, IASCO employed and maintained flight personnel and assigned such personnel to JAL. JAL paid IASCO, the employer, a basic fixed fee of a flat monthly payment plus a monthly unit charge. It was the responsibility of IASCO to ensure that all assigned personnel remained quali-

tween JAL and the Japanese government[180] was considerably weaker than the "close relationship" emphasized by the Board in *British Rail* and *AGIP*.[181]

International Air goes much further than the NLRB's earlier decisions in formulating a policy of discretionary abstention from the United States operations of foreign governments and their instrumentalities. It is this strong policy of deference that the Board chose to disregard in its subsequent decisions in *State Bank of India*[182] and *SK Products Corp.*[183]

Finally, the decisions arising from the labor disputes of employees of the World Bank bear upon the question of deference to foreign sovereigns. After its initial assertion of jurisdiction was rebuked by the Court of Appeals for the District of Columbia,[184] the Board held that as an international organization the World Bank was not within its jurisdiction.[185] The court agreed with the Board's emphasis[186] upon the bank's genesis in an agreement ratified by many countries, its status as a specialized agency of the United Nations, and the unique advantages enjoyed by the World Bank.[187] In reliance upon these factors the court concluded that "the World

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fied to perform the duties required by JAL. However, during the performance of their duties, IASCO flight personnel assigned to JAL were under the supervision and control of JAL even though their immediate supervision was by IASCO personnel. 216 N.L.R.B. at 782-83, 88 L.R.R.M. 1337-39.

179. In an earlier decision the Board had decided that JAL was not an employer under the NLRA. International In-Flight Catering Co., 209 N.L.R.B. 444, 85 L.R.R.M. 1364 (1974). The Board did not need to decide whether JAL might also be exempted from the coverage of the Act because of its status as a foreign-flag air carrier. 216 N.L.R.B. at 784 n.8, 88 L.R.R.M. at 1339 n.8.

180. The only evidence of direct government control was the ownership of 50 percent of JAL's stock by the Japanese Government.

181. Compare Japan's 50 percent stock ownership of JAL with Britain's complete stock ownership of British Rail-Int'l and Italy's 97 percent ownership of AGIP. In addition both Britain and Italy retained considerable control over the appointment of directors and officers.

182. *See* text accompanying notes 190-208 *infra.*

183. *See* text accompanying notes 209-21 *infra.*

184. In Herbert Harvey, Inc., 159 N.L.R.B. 254, 62 L.R.R.M. 1253 (1966), the Board asserted jurisdiction in a representation proceeding involving the maintenance employees in the building occupied by the World Bank. The Board found that the Bank was not the employer of the maintenance workers. This finding was overruled by the Circuit Court of Appeals for the District of Columbia. Herbert Harvey, Inc. v. NLRB, 385 F.2d 684 (D.C. Cir. 1967). The case was remanded to the Board for a determination of whether the Bank might be exempted from the Act's provisions, thus barring the assertion of jurisdiction. *Id.* at 686.

185. Herbert Harvey, Inc., 171 N.L.R.B. 238, 68 L.R.R.M. 1053 (1968).

186. Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 773 (D.C. Cir. 1969).

187. *Id.*

Bank is an international organization which enjoys the privileges and immunities from the laws of the sovereignty in which it is located customarily extended to such organizations."[188] The World Bank decisions stand as further support for a general Board policy of deference to foreign sovereigns,[189] permitting them to pursue their own labor relations policies while operating within the United States.

B. *State Bank of India Decision*

In *State Bank of India*[190] the NLRB expressly overruled its earlier holdings in *British Rail-International, Inc.*,[191] and *AGIP, USA, Inc.*,[192] asserting jurisdiction over the State Bank's Chicago branch office.[193] Statutory jurisdiction was found to exist because the bank's operations affected commerce and met the NLRB's jurisdictional standards for such enterprises.[194] It was immaterial, ac-

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188. *Id.* In reaching this holding the court placed strong emphasis upon the Supreme Court's language in *Benz*, indicating that absent an express congressional mandate intervention in such a delicate field of international relations would be inappropriate. *See* text accompanying notes 49-50 *supra.*

189. *See also* 28 U.S.C. § 1611 (1976); COMMITTEE REPORTS, *supra* note 20, at 30.

190. 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977). Over 92 percent of the State Bank's stock was owned by the Reserve Bank of India (RBI), which in turn was a wholly owned and controlled agency of the Indian government. Sixteen of the State Bank's eighteen directors were either appointed by, or subject to approval by, the Indian government. As an agent for RBI the State Bank performed numerous governmental functions, including the collection of taxes, holding of Central government money, payment of government employees' checks, determination of required bank reserves, and printing of bank notes which constituted legal tender.

The nexus between the State Bank and Indian government is at least as strong as the "close relationship" emphasized by the Board in the earlier decisions where it declined to assert jurisdiction. *See* notes 166 & 171, and text accompanying notes 162-75 *supra.* In addition to the connections discussed above, the State Bank was also strongly involved in assisting traditional Indian exports, the buying and selling of foreign exchange, and other international monetary transactions relating to international trade and investment.

191. 163 N.L.R.B. 721, 64 L.R.R.M. 1432 (1967); *see* text accompanying notes 162-66 *supra.*

192. 196 N.L.R.B. 1144, 80 L.R.R.M.1245 (1972); *see* text accompanying notes 167-75 *supra.*

193. The Chicago branch was licensed "to engage in a general banking business" by virtue of a certificate issued pursuant to the Foreign Banking Office Act of 1973, Ill. Rev. Stat. Ch. 16 ½ § 501, *et seq.* The certificate permitted the Bank to engage in a full spectrum of banking functions, subject to essentially the same restrictions and requirements as Illinois-chartered domestic banks. 229 N.L.R.B. at 839, 95 L.R.R.M. at 1143-44.

194. The stipulated facts were sufficient to warrant these findings. 229

cording to the Board, that the State Bank was organized under the laws of India, since the bank was authorized to engage in and was engaged in, business operations within the United States.[195] Thus, the Board rejected the bank's argument that, as an instrumentality of a foreign government, it did not come within the definition of an employer under the NLRA.[196] The record indicated that the branch manager had responsibility for the day-to-day operations and personnel decisions, although overall policy decisions were made by the central office in India.[197] Significantly, only two of the eleven locally hired employees were Indian nationals.[198]

Perhaps the most intriguing aspect of the Board's decision is its treatment of the Foreign Sovereign Immunities Act. After finding that the FSIA was confined to judicial proceedings and thus did not affect the actions of administrative agencies,[199] the Board proceeded to examine the provisions of the FSIA in considerable detail.[200] The Board concluded that the FSIA lent support to its decision to assert jurisdiction over foreign government employers.[201]

N.L.R.B. at 840, 95 L.R.R.M. at 1144.

195. *Id.; see* Royal Bank of Canada (San Juan Branch), 67 N.L.R.B. 403, 17 L.R.R.M. 447 (1946). *See also* Delta Match Corp., 102 N.L.R.B. 1400, 1401 n.2, 31 L.R.R.M. 1464, 1464 (1953).

196. 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144; *see* note 43 & text accompanying notes 40-46 *supra*. Under the Board's construction of the NLRA the burden was upon the employer to demonstrate an affirmative intention of Congress to exclude this type of employer from the Act's coverage. 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144. The employer had argued that the burden was upon the petitioner union to demonstrate an affirmative intention of Congress to confer jurisdiction over foreign government instrumentalities. *Id.* The Board's treatment of this issue provides an interesting comparison with the burden of proof scheme outlined in the legislative history to the FSIA:

> since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity . . . . Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

COMMITTEE REPORTS, *supra* note 20, at 17.

197. 229 N.L.R.B. at 839, 95 L.R.R.M. at 1143-44.

198. *Id.*, 95 L.R.R.M. at 1144; *see* text accompanying notes 84-90 *supra*.

199. 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146; *but see* text accompanying notes 109-44 *supra*.

200. The Board's thorough and reasonable treatment of the FSIA suggests that it would have no difficulty in developing expertise in application of the FSIA. *See* 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146; text accompanying notes 134-36 *supra*.

201. 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.

Prior to *State Bank of India* the NLRB had developed a policy of discretionary abstention with regard to foreign state enterprises operating within the United States.[202] In reversing this policy and asserting jurisdiction over the representation proceeding the Board stated:

> [W]e now conclude that there is no public policy or policy of the Act which, on the ground that the employer is discolsed [sic] to be an "agency" or "instrumentality" of a foreign state, justifies us to continue to decline jurisdiction in cases affecting employees in our own country whose employer engages in commercial activity which meets the Board's jurisdictional standards for such enterprises.[203]

State Bank of India thus originates a new Board policy of asserting jurisdiction over foreign government employers.

The Board distinguished the Supreme Court's earlier decisions in *McCulloch v. Sociedad Nacional de Marineros*[204] and *Benz v. Compañia Naviera Hidalgo,*[205] holding that the cases were primarily concerned with the application of American labor laws to the "internal management and affairs" of foreign flag vessels with foreign crews while the vessels were temporarily within American territorial waters.[206] The Board also distinguished its decision in *Herbert Harvey, Inc.,* involving the World Bank.[207] The Board pointed out that as an international organization the World Bank enjoyed a specific statutory grant of sovereign immunity.[208]

C. *SK Products Corporation Decision*

In *SK Products Corp.,*[209] decided soon after *State Bank of India,* the NLRB again asserted jurisdiction over an instrumentality of a foreign government.[210] The Board rejected the employer's argument that, since it was a wholly-owned, controlled and managed subsidiary of a Yugoslav parent corporation,[211] which in turn

202. *See, e.g.,* AGIP, USA, Inc., 196 N.L.R.B. 1144, 80 L.R.R.M. 1245 (1972); British Rail-Int'l Inc., 163 N.L.R.B. 721, 64 L.R.R.M. 1432 (1967).

203. 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.

204. 372 U.S. 10 (1962); *see* text accompanying notes 95-100 *supra.*

205. 353 U.S. 138 (1957); *see* text accompanying notes 47-50 *supra.*

206. 229 N.L.R.B. at 840-41, 95 L.R.R.M. at 1145.

207. 171 N.L.R.B. 238, 68 L.R.R.M. 1053 (1968); *see* note 184 & text accompanying notes 184-89 *supra.*

208. 229 N.L.R.B. at 841 n.14, 95 L.R.R.M. at 1145 n.14, where the Board alluded to the International Organization Immunities Act, *codified at* 22 U.S.C. § 288 to 288f-2 & scattered sections of 42 U.S.C. (1976).

209. 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498 (1977).

210. *Id.* at 1502.

211. SK Products Corp. imported, assembled, and distributed furniture com-

formed an integral part of the Yugoslav government,[212] assertion of jurisdiction over it would be inappropriate.[213] In fact, the Board concluded that, because the employer was an American corporation licensed to do business in several states of the United States, *SK Products Corp.* presented an even stronger case for assertion of jurisdiction over *State Bank of India*.[214] The record indicated that overall policy decisions were made in Yugoslavia, but that the president of the American corporation had "final domestic authority" over the employer's operations.[215] The record was silent about the nationality of the nonsupervisory employees at the plant involved in the representation campaign.[216]

The Board again reached the conclusion that section 2(2) of the NLRA, exempting "wholly owned Government corporations," does not include foreign state enterprises,[217] and the FSIA was once more deemed inapplicable to NLRB proceedings.[218] Nonetheless, in another detailed analysis of the FSIA, the Board concluded that the recent enactment supported its reversal of policy as to foreign government employers.[219] Ultimately, the Board premised its assertion of jurisdiction upon the need to treat all employees within the United States similarly, which could be accomplished only through elimination of the "islands of immunity" that had pre-

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ponents produced by the parent corporation, Slovenijales, Yugoslavia's second largest producer of wood products.

212. Slovenijales is Yugoslavia's leading exporter of commodities manufactured in one of the country's most important industries. Of the eight members of SK Products Corporation's board of directors, six were Yugoslav nationals and the remaining two were United States citizens. SK Products Corporation was wholly owned by Slovenijales, which in turn was "socially owned" by the workers for the benefit of the state. 95 L.R.R.M. at 1499.

213. *Id.* at 1500.

214. *Id.* at 1500-01. The representation campaign involved the employer's Alsip, Illinois facility where SK Products Corporation was licensed to transact business pursuant to a certificate issued under "The Business Corporation Act" of Illinois in force July 13, 1933. SK Products Corp. was incorporated under the laws of the State of New Jersey. 95 L.R.R.M. at 1500 n.7.

215. 95 L.R.R.M. at 1499-1500.

216. *Id.* at 1500. On a national scale approximately 30 percent of the corporation's nonsupervisory employees were Yugoslav nationals, with the remaining 70 percent presumably being United States citizens. The Board cited to its earlier decisions in Dan Logan, 55 N.L.R.B. 310, 315, 14 L.R.R.M. 20, 20 (1944), and Clare, C.P. & Co., 191 N.L.R.B. 589, 77 L.R.R.M. 1535 (1971), as support for the proposition that the NLRA does not differentiate between citizens and noncitizens. 95 L.R.R.M. at 1500 n.8; *see* note 88 & text accompanying notes 84-90 *supra*.

217. 95 L.R.R.M. at 1500; *see* note 196 *supra*.

218. 95 L.R.R.M. at 1500.

219. *Id.* at 1500-01.

viously existed.[220] The Board felt that its exercise of national sovereignty was consonant with generally accepted principles of international law.[221]

VI. CONCLUSION

Until its decisions in *State Bank of India* and *SK Products Corp.* the NLRB had declined to assert jurisdiction over foreign government employers. The Board's policy of abstention was based on the need to have only one sovereign administering the employer-employee relationship, the desire to avoid international discord, the Supreme Court's caution against giving the NLRA extraterritorial application in the absence of an "affirmative intention of the Congress clearly expressed," and the desire to avoid conflicts between the laws of two sovereign states. Despite the Board's conclusion that neither public policy nor the policies of the NLRA continue to justify abstention, the factors discussed above are still important, especially when the NLRA is applied to employees who are citizens of the foreign government for whom they work. Thus, the NLRB's new policy of asserting jurisdiction over foreign government employers will not be achieved without costs. International discord, potential conflicts of law, and administrative difficulty in applying the NLRA to employees who are citizens of the foreign government for whom they work, are harms which could result from the new policy.

The Board has also concluded that its proceedings are unaffected by the Foreign Sovereign Immunities Act of 1976. The legislative history of the FSIA, as has been pointed out above, however, contains several examples of how a foreign government's employment practices in the United States may constitute "commercial activity" under the provisions of the FSIA. This legislative history clearly indicates that Congress intended the FSIA to apply to the labor relations practices of foreign governments doing business in the United States and to any proceedings that might stem from the employment practices. Application of the FSIA to Board proceedings would ensure more uniform resolution of sovereign immunity questions, would increase administrative and judicial economy, and would further effectuate the policies of the NLRA by providing a speedier resolution of labor disputes.

Dan T. Carter

220. *Id.* at 1501.
221. *Id.*