

Fordham International Law Journal

Volume 15, Issue 4

1991

Article 5

Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity

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Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity

Sandra Engle

Abstract

This Note argues that federal common law should determine all attribution of liability issues in actions brought under the FSIA. Part I discusses the FSIA, its history and policies, and the sole U.S. Supreme Court decision to discuss the proper choice of law approach for attribution of liability under the FSIA. Part II examines subsequent cases that have either followed or distinguished the Supreme Court's choice of law approach in deciding questions of agency or respondeat superior. Part III argues that congressional intent demands the application of federal common law to determine questions of attribution of liability in actions brought under the FSIA. This Note concludes that federal courts should apply federal common law to determine the limited question of attribution of liability.

NOTES

CHOOSING LAW FOR ATTRIBUTING LIABILITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT: A PROPOSAL FOR UNIFORMITY*

INTRODUCTION

Congress passed the Foreign Sovereign Immunities Act of 1976 (the "FSIA" or "Act")¹ in order to establish the circumstances and procedures by which a foreign state or its instrumentality may be sued in a U.S. court.² To this end, the FSIA sets forth the basis for obtaining both personal and subject matter jurisdiction over a foreign state or its instrumentalities.³ The Act does not include, however, any substantive law of liability, because its basic premise is non-liability, i.e., immunity.⁴ Nonetheless, issues of subject matter jurisdiction often entail questions of substantive law under the FSIA.⁵ For example, plaintiffs have sued a foreign state based on the acts or omissions of its instrumentality⁶ by applying the related doctrines of respondeat superior or agency,⁷ so that the liabilities of the

* The author wishes to thank Professor Marc Arkin, Fordham University, School of Law, for her valuable criticisms and comments, and Paul Borysewicz for his thoughtful readings.

1. 28 U.S.C. §§ 1602-1611 (1988).

2. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S.C.C.A.N. 6604. *See generally* MICHAEL WALLACE GORDON, *FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS* (1991); Beverly May Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979).

3. 28 U.S.C. §§ 1604 (describing extent of immunity from subject matter jurisdiction) and 1608 (describing methods of obtaining personal jurisdiction) (1988).

4. 28 U.S.C. §§ 1602-1611 (1988).

5. *See generally* A. John Sutham, Note, *Brokering a Difficult Marriage: Substantive Defenses Under Rule 60(b)(4) Relief from Default Judgments in Foreign Sovereign Immunities Proceedings*, 14 FORDHAM INT'L L.J. 216 (1990-1991) (discussing overlap of substantive and jurisdictional issues in FSIA).

6. *See, e.g.*, *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989).

7. *See* RESTATEMENT (SECOND) AGENCY § 2 cmt. a (1958) (comparing respondeat superior terms "master and servant" to agency terms "principal and agent" and noting that "[a] master is a species of principal, and a servant is a species of agent"); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 2 (2d ed. 1990) (defining law of agency as including principal-agent as well as master-servant relationships); BLACK'S LAW DICTIONARY 62, 1211-12 (6th ed. 1990)

instrumentalities are attributed to the foreign state.⁸

In these "attribution of liability" cases, the court must decide whether to apply federal or state common law to define the legal relationship between a foreign state and its instrumentality.⁹ Although respondeat superior and agency are closely related doctrines, courts have inconsistently chosen the governing law for FSIA attribution of liability issues.¹⁰ When the attribution of liability is based on principles of agency, most courts have applied federal common law.¹¹ On the other hand, if attribution of liability is based on the principle of respondeat superior, courts have held that state common law controls.¹²

(defining "respondeat superior" as "the maxim [holding] masters liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent" and defining "agency" as the "[r]elation in which one person acts for or represents another by latter's authority, either in the relationship of *principal and agent or master and servant*") (emphasis added).

8. See GORDON A. CHRISTENSON, *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 321 (Richard B. Lillich ed. 1983). Mr. Christenson notes that "[p]roperly understood, the doctrine of attribution in international law serves the purpose of allocating responsibility to the State for the consequences of certain wrongful acts or omissions of its organs and officials. It also defines the sphere of private or non-State conduct for which the state bears no responsibility." *Id.* See Ronald D. Lee, Note, *Jurisdiction Over Foreign States for Acts of Their Instrumentalities: A Model for Attributing Liability*, 94 *YALE L.J.* 394 (1984) (discussing suits brought against foreign states based on attribution principles). The phrase "attribution of liability" is also used in non-FSIA contexts to describe situations in which one party is held vicariously liable for the acts of another. See *Bush v. Viterna*, 795 F.2d 1203, 1206 (5th Cir. 1986) (discussing attribution of acts of county officials to state commission through doctrine of respondeat superior in 42 U.S.C. § 1983 civil rights action); *Keys v. Wolfe*, 540 F. Supp. 1054, 1062 (N.D. Tex. 1982) (discussing attribution principles "such as conspiracy membership, agency, or aider and abettor"), *rev'd on other grounds*, 709 F.2d 413 (5th Cir. 1983).

9. See, e.g., *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414 (D.D.C. 1983).

10. Compare *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989) (declining to apply federal common law to questions of agency) with *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (applying federal common law to determine propriety of attributing acts of instrumentality to foreign state based on agency principles).

11. See, e.g., *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nig.*, 879 F.2d 170, 177 (5th Cir. 1989); *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Eth.*, 616 F. Supp. 660, 666 (W.D. Mich. 1985); but see *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989) (declining to apply federal common law to agency issue).

12. See *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, — U.S. —, 111 S. Ct. 27 (1990); *Joseph v. Office of Consulate General of Nig.*, 830 F.2d

This Note argues that federal common law should determine all attribution of liability issues in actions brought under the FSIA. Part I discusses the FSIA, its history and policies, and the sole U.S. Supreme Court decision to discuss the proper choice of law approach for attribution of liability under the FSIA. Part II examines subsequent cases that have either followed or distinguished the Supreme Court's choice of law approach in deciding questions of agency or respondeat superior. Part III argues that congressional intent demands the application of federal common law to determine questions of attribution of liability in actions brought under the FSIA. This Note concludes that federal courts should apply federal common law to determine the limited question of attribution of liability.¹³

I. U.S. FOREIGN SOVEREIGN IMMUNITIES PRACTICE: PAST AND PRESENT

Prior to the passage of the FSIA in 1976, U.S. courts granted immunity to foreign sovereigns based primarily on political, as opposed to legal, considerations.¹⁴ Congress passed the Act to resolve the problems inherent in the ad hoc approach to determining the scope of foreign sovereign immunity.¹⁵ A primary aim of the FSIA, therefore, was to standardize and achieve uniformity in U.S. foreign sovereign immunity practice.¹⁶ In its only decision to consider a choice of law question involving the FSIA, the Supreme Court held, in *First National City Bank, N.A. v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"),¹⁷ that federal common law should determine the separate juridical status of an entity wholly owned by a foreign state.

1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414 (D.D.C. 1983); *Castro v. Saudi Arabia*, 510 F. Supp. 309 (W.D. Tex. 1980).

13. This Note limits itself to arguing for a uniform federal standard. It does not set forth the most appropriate standard because a consideration of that issue demands an in-depth analysis of the laws of nations other than the United States.

14. *See infra* notes 21-37 and accompanying text (discussing pre-FSIA foreign sovereign immunity practice in United States).

15. *Id.* *See infra* notes 33-45.

16. *See infra* notes 47-53 and accompanying text (discussing congressional desire for uniformity).

17. 462 U.S. 611 (1983) [hereinafter *Bancec*].

A. *Foreign Sovereign Immunities Decisions Prior to Passage of the Foreign Sovereign Immunities Act of 1976*

Through the FSIA, Congress attempted to codify a system that would give U.S. citizens a right to legal redress against foreign states in limited circumstances.¹⁸ The Act is the sole means by which U.S. courts may gain subject matter jurisdiction over claims against a foreign state.¹⁹ The Act also delineates the specific circumstances under which a foreign government may not claim the defense of foreign sovereign immunity.²⁰

Congress passed the FSIA to resolve the problems inherent in the previous system for determining the scope of foreign sovereign immunity in U.S. law.²¹ In the early nineteenth century, U.S. federal courts applied federal common law, recog-

18. *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 24 (1976)* (statement of Monroe Leigh, Legal Advisor, U.S. Department of State). The 1976 Act was the second attempt to pass a comprehensive foreign sovereign immunities statute. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6608. In 1973, the House of Representatives of the 93d Congress, First Session, introduced House of Representatives 3493. *Id.* That bill went as far as a hearing before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary. *Id.* However, after the hearing, the Subcommittee realized that the private bar had not been fully consulted. *Id.* In addition, unforeseen problems in the area of maritime cases, jurisdictional provisions, and attachment and execution became apparent. *Id.* After correcting these deficiencies and seeking more consultation from the private bar, House of Representatives 11315 was introduced during the second session of the 94th Congress. *Id.* The legislative history of the Act notes that “[H.R. 11315] is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.” *Id.*

19. 28 U.S.C. §§ 1604-1605 (1988). *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604. The Act “define[s] the jurisdiction of United States courts in suits against foreign states.” *Id.* *See* *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (stating that “[w]e think that the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts”); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990) (stating that “Congress intended the Act to be comprehensive, and courts have consistently so interpreted its provisions”); *Meadows v. Dom. Rep.*, 628 F. Supp. 599, 603 (N.D. Cal.) (stating that “[b]y adopting the FSIA, Congress intended to provide nationwide and uniform regulations for the maintenance of suits against foreign states and their entities in the courts of the United States”), *aff’d*, 817 F.2d 517, *cert. denied*, 484 U.S. 976 (1987).

20. 28 U.S.C. §§ 1604-1605 (1988). H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

21. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1, *reprinted in* 1976

nizing an absolute view of sovereign immunity which exempted foreign states from all suits in U.S. courts.²² This absolute theory of sovereign immunity produced hardship for U.S. citizens involved in contracts with foreign entities or suffering torts committed by foreign entities, because the U.S. citizens simply had no opportunity for legal redress in U.S. courts.

By the mid-1940s, the U.S. judiciary adopted a less restrictive approach to the issue, deferring to the practices and policies of the U.S. Department of State concerning the propriety of granting sovereign immunity in suits involving foreign sovereigns.²³ In *Ex Parte Peru*, the U.S. Supreme Court explained that deference to the executive was mandated by the nature of

U.S.C.C.A.N. 6604. *But see* *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982). The *Gibbons* court commented that

the Foreign Sovereign Immunities Act of 1976 . . . [is] a six-year-old statutory labyrinth that, owing to the numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.

Gibbons, 549 F. Supp. at 1105.

22. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). Chief Justice Marshall stated that because all sovereigns possess "equal rights and equal independence" under international law, a sovereign enters the territory of a friendly foreign government "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." *Id.* at 136-37. *Schooner Exchange* was a suit involving a foreign military vessel, but 100 years later the Supreme Court extended the cloak of immunity to commercial vessels of a foreign state. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926). In *Berizzi*, the Court stated that:

[t]he principles [of sovereign immunity] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are.

Berizzi, 271 U.S. at 574. Thus, the absolute theory of sovereign immunity extended to all acts of the foreign state whether they were governmental or commercial in nature. *Id.*

23. *See, e.g., Ex Parte Peru*, 318 U.S. 578 (1943). *Peru* demonstrates that the Court began to view the question of foreign sovereign immunity increasingly as "a mixed legal and political question with respect to which determinations of the Executive Branch should be accorded conclusive effect." *Williams v. Shipping Corp. of India*, 653 F.2d 875, 877 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). The legislative history of the Act states, as a result of decisions such as *Peru*, that "[i]n the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

foreign sovereign immunity²⁴ and separation of powers principles.²⁵

In 1952, the U.S. Department of State announced its modification of this practice in the landmark letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman ("Tate Letter").²⁶ In the Tate Letter, the Department of State adopted a legal standard known as the restrictive theory of sovereign immunity,²⁷ by which it advised courts to grant foreign states immunity only for their public acts and not for actions arising out of their strictly commercial or private acts.²⁸

Although the Tate Letter's adoption of a legal standard seemed to represent a retreat from the absolute authority granted to the Department of State to decide foreign sovereign immunity questions absent legal standards, the Tate Letter indicated that the Department of State still retained the prerogative to issue recommendations.²⁹ The Tate Letter also

24. 318 U.S. 578, 586-90 (1943). In *Peru*, the U.S. Supreme Court stated that because foreign sovereign immunity is a "matter of grace and comity on the part of the United States, and not a Constitutional restriction," U.S. courts should automatically defer to suggestions of immunity from the executive branch. *Id.*

25. *Id.* at 588 (stating that maintaining personal jurisdiction over a foreign state by seizing and detaining the property of the foreign state would "embarrass the executive arm of the Government in conducting foreign relations"); see also *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (holding that "it is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize").

26. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (appendix to opinion of White, J.).

27. *Id.* Mr. Tate's rationale was based on the growing acceptance among nations that a restrictive theory of sovereign immunity is better suited to the modern world in which governments become involved in commercial transactions in and in which parties may be less willing to contract with governments if the governments are given absolute immunity for their commercial acts. *Id.*

28. *Id.* Mr. Tate described the restricted theory of sovereign immunity as existing "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private (*jure gestionis*)." *Id.* See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605; *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1228 (C.D. Cal. 1987), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

29. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (appendix to opinion of White, J.). See H.R. REP. NO. 1487, 94th Cong., 2d

strongly suggested that the courts would be compelled to follow such recommendations.³⁰ Indeed, overriding political considerations still influenced post-Tate Letter Department of State decisions regarding sovereign immunity in individual cases.³¹ When “nonfriendly” countries did not seek the aid of

Sess. 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607. The legislative history of the Act states that

[t]he Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the [U.S. State] Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

Id.

30. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984-85 (1952), *and in* *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (appendix to opinion of White, J.). Mr. Tate wrote to the acting U.S. Attorney General that

it will hereafter be the [U.S. State] Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity. It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign affairs.

Id.

31. *See, e.g.,* *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480 (1983). The Supreme Court in *Verlinden* stated that “foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.” *Id.* at 487. *See Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 65* (1976) (statement of Michael H. Cardozo, former legal advisor to the Department of State and Justice Department, lecturer in international law, and attorney in Washington, D.C.). Mr. Cardozo illustrated the continued presence of political considerations in granting foreign sovereign immunity, stating that:

[t]he most interesting [example of State Department flexibility] in recent times, of course, was the case of the Eastern Airlines plane that was hijacked to Cuba just at the same time that a Cuban vessel was being attached in this country. And when we approached the Cubans and said, “Surely you're going to release that plane and its passengers immediately,” they said “Oh, of course, we will, just as soon as you release our ship.” And the State Department very quickly sent a telegram to the judge in that case and said, “We suggest immunity,” although it was a commercial transaction. The ship was quickly released and the plane was released.

Id. *See* *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir.)

the Department of State and no suggestion of immunity letter was written, courts decided whether the sovereign should be immune based on the inconsistent Department of State decisions and the few instances in which courts had interpreted the restrictive theory.³²

B. *The Foreign Sovereign Immunities Act of 1976*

1. Departure from the Past

In 1976, the U.S. Congress passed the Foreign Sovereign Immunities Act to resolve the difficulties created by the Tate Letter and to bring the U.S. practice into conformity with that of other countries.³³ The Act provided the first comprehensive statutory scheme to define subject matter and personal jurisdiction over foreign states.³⁴ The FSIA also defined the legal standards necessary for a foreign defendant to raise a successful claim of foreign sovereign immunity.³⁵

(stating that “[t]he potential harm or embarrassment resulting to our government from a judicial finding of jurisdiction, in the face of an Executive recommendation to the contrary, may be just as severe where the foreign sovereign had initially contracted to waive its claim of sovereign immunity as where it had not done so”), *cert. denied*, 404 U.S. 985 (1971).

32. *See, e.g.*, *National American Corp. v. Federal Republic of Nig.*, 420 F. Supp. 954, 956 (S.D.N.Y. 1976) (stating that “[i]t does not appear that defendants have requested the State Department to recommend that immunity be granted, nor has the State Department done so. The determination of this issue rests with the Court”).

33. *See Gregorian v. Izvetsia*, 658 F. Supp. 1224, 1231 (C.D. Cal. 1987), *aff’d in part, rev’d in part*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). The court in *Gregorian* stated that “[i]t remains a principal purpose of the FSIA to conform U.S. immunity practice to virtually every other country in the world, where sovereign immunity decision are made exclusively by the courts and not by foreign affairs agencies.” *Id.* *See also Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977) (stating that primary purpose of FSIA is to “provide[] a unitary rule for determinations of claims of sovereign immunity in legal actions in the United States, thereby eliminating the role of the State Department in such questions and bringing the United States into conformity with the immunity practice of virtually every other country”).

34. 28 U.S.C. §§ 1602-1611 (1988). *See Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 25-26 (1976)* (statements of Monroe Leigh, Legal Advisor, U.S. Department of State). Mr. Leigh testified that “the bill would set forth, for the first time, in our judicial code, comprehensive methods for beginning a lawsuit against a foreign state through service of process and for obtaining personal jurisdiction over foreign-government defendants.” *Id.*

35. 28 U.S.C. §§ 1604-1605 (1988). *See H.R. REP. NO. 1487, 94th Cong., 2d*

In a significant departure from the procedure enunciated in the Tate Letter, the FSIA vested in U.S. courts full authority to decide questions of sovereign immunity defenses.³⁶ Beyond the issue of personal jurisdiction, the FSIA grants broadened subject matter jurisdiction to the federal courts for matters involving foreign governments.³⁷ Under the FSIA, a plaintiff may initiate a suit in a federal court without regard to traditional requirements for diversity jurisdiction such as diversity

Sess. 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613. The legislative history indicates that the FSIA "set[s] forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states." *Id.*

36. *Compare* 28 U.S.C. § 1602 (1988) with Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984-85 (1952) and in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) (appendix to opinion of White, J.). *See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. The legislative history of the FSIA indicates that

[a] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. . . . U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Id. *See* *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1228 (C.D. Cal. 1987) (stating that "[t]he Act transferred the determination of immunity to the courts in order to strengthen the integrity of the legal process by which this determination was made"), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

37. 28 U.S.C. §§ 1604-1605 (1988). *See* *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 497 (1983) (stating that "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States"); *Gray v. Permanent Mission of People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 819 (S.D.N.Y. 1978) (stating that "[w]hile Congress left open the option to bring actions against foreign states in the state courts, it clearly intended to encourage the bringing of such actions in federal courts"); *see also* *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 35-36 (1976)* (statement of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice). Mr. Ristau testified that "the underlying rationale of the draftsmen of this bill—and I assure you there was considerable debate—was to develop . . . in the future, a consistent body of Federal law and to place the responsibility primarily in the Federal judiciary." *Id.* at 36.

of citizenship or a minimum amount in controversy.³⁸ As part of the same scheme to encourage access to federal courts, Congress amended the removal statute to ease removal from state courts to federal district courts of suits brought against foreign states.³⁹

To limit the application of the defense of foreign sovereign immunity, the Act also codified the restrictive theory of sovereign immunity.⁴⁰ Although the Tate Letter advocated the

38. 28 U.S.C. § 1330(a) (1988). This provision conferring jurisdiction created in the district courts

original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id. Prior to the passage of the FSIA, district courts had subject matter jurisdiction in suits involving foreign states based on diversity jurisdiction. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 14 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6613.

39. 28 U.S.C. § 1441(d) (1988). Section 1441(d) provides that "any civil action brought in a State court against a foreign state . . . may be removed by the foreign state" to the local district court. This provision allows removal without regard to the amount in controversy or diversity of citizenship. *Id.* See *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 35 (1976)* (statement of Monroe Leigh, Legal Advisor, U.S. Department of State). During the hearing before the Subcommittee on Administrative Law and Governmental Relations, Mr. Leigh was questioned about the removal provision which would allow a foreign state to remove a case to a federal district court filed originally in a state court. *Id.* The witness was asked why there is a removal provision rather than a provision which mandated that all suits against foreign sovereigns be filed in the federal system. *Id.* The witness answered that

it was felt that because of existing practice and because there might be some cases in which the State courts would be satisfactory to the foreign defendant government—we would simply follow the removal procedures available under other sections of the judicial code.

But I would be frank to admit that this could have gone either way. The general theory is that it would be better to have these ultimately decided in the Federal courts so as to produce a more systematic body of case law interpreting the provisions of this legislation.

Id.

40. 28 U.S.C. § 1602 (1988) ("Findings and Declaration of Purpose"). Section 1602 provides that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." *Id.* See *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 386 (S.D.N.Y.) (stating that "[t]he Act codifies the principle of 'restrictive' sovereign immunity in that, under international law, foreign states are immune from suits based on their public acts, but not on their commercial or private acts"), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979).

application of the restrictive theory, in practice the recognition of sovereign immunity remained very much a political, rather than a legal, decision.⁴¹ By vesting authority solely with the courts and by removing it from a political institution, the FSIA provided the means to apply the restrictive theory.⁴²

The legislative history of the Act indicates that the FSIA preempts all existing state and federal law.⁴³ As evidence of this comprehensive intent, Congress included numerous provisions in the FSIA in order to address virtually all procedural issues that might arise in an action brought against a foreign state.⁴⁴ Indeed, some courts have concluded that, based on the broad scope and preemptive force of the Act, the decisions involving foreign sovereign immunity made before the effective date of the FSIA are no longer valid.⁴⁵

41. See Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 *INT'L & COMP. L.Q.* 302, 304 (1986) (discussing political nature of post-Tate Letter foreign sovereign immunity decisions).

42. See *supra* notes 36-39 and accompanying text (discussing granting of exclusive judicial authority to decide issues of foreign sovereign immunity).

43. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S.C.C.A.N. 6604, 6610. The legislative history of the Act states that the FSIA preempts "any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies and their instrumentalities." *Id.*

44. See 28 U.S.C. § 1607 ("Counterclaims"); § 1608 ("Service; time to answer; default"); § 1609 ("Immunity from attachment and execution of property of a foreign state"); § 1610 ("Exceptions to the immunity from attachment or execution"); § 1611 ("Certain types of property immune from execution") (1988).

45. See, e.g., *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1102-03 (9th Cir. 1990). In *Chuidian*, the U.S. Court of Appeals for the Ninth Circuit held that

the Act [cannot] reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials. . . . [N]o authority supports the continued validity of the pre-1976 common law in light of the Act. Indeed the American Law Institute recently issued the Restatement (Third) of Foreign Relations Law, superseding the Second Restatement[] The new restatement deletes in its entirety the discussion of the United States common law of sovereign immunity, and substitutes a section analyzing such issues exclusively under the Act.

Id. The Supreme Court supported this view, noting that in the pre-FSIA cases "the governing standards were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 488 (1983). *But see Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 53 (1976)* (statement of Monroe Leigh, Legal Advisor, U.S. Department of State). Mr. Leigh testified that "we have decided to put our faith in the U.S. courts to work out progressively, on a case-by-case basis, and using such guidance as has already

2. The Foreign Sovereign Immunities Act of 1976: Legislative Intent and Basic Elements

The U.S. Congress drafted the FSIA using comprehensive terms⁴⁶ because it intended that the courts develop a uniform body of jurisprudence under the FSIA.⁴⁷ Thus, the Act is the sole means for adjudicating foreign sovereign immunity decisions in the United States.⁴⁸ Congress intended that this uniform body of jurisprudence produce three effects. First, by

developed in the very large body of case law which exists, on the distinction between commercial and governmental [acts]." *Id.*

46. 28 U.S.C. §§ 1602-1611 (1988). See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 437 (1989) (referring to "comprehensiveness of the statutory scheme in the FSIA"). For example, the FSIA changed the means of serving process and gaining personal jurisdiction over foreign states. 28 U.S.C. at § 1602. Prior to the passage of the FSIA, a litigant obtained personal jurisdiction over a foreign state by attaching the state's property located in the United States. 28 U.S.C. §§ 1608-1611 (1988). See *George Kahale III & Matias A. Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 221 (1979). The FSIA ended this embarrassing practice by providing in detail the multiple manner of serving a summons and complaint on a foreign state. 28 U.S.C. § 1608 (1988). See *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 94th Cong., 2d Sess. 25-26, 28-29 (1976) (statements of Monroe Leigh, Legal Advisor, U.S. Department of State). Mr. Leigh testified that

[the bill will] obviate the necessity of attempting to begin a lawsuit by attaching a foreign government's property. Such attachments are the one area where an occasional diplomatic problem has arisen in the past.

....

... As stated in the letter of transmittal to the Speaker of the House from the Deputy Secretary of State and the Deputy Attorney General, the broad purposes of the bill are "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation."

Id.

47. See *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1212 (5th Cir. 1991) (stating that the FSIA's purpose would best be served by the "development of a uniform body of [FSIA] law") (citations omitted); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 (5th Cir. 1982) (stating that "Congress chose to treat jurisdiction of actions against foreign sovereigns in a uniform and comprehensive manner"); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 879 (4th Cir. 1981) (stating that "[b]oth the statutory language and the legislative history evince the congressional desire to achieve uniformity of decisional law in the area of suits against foreign sovereigns"), *cert. denied*, 455 U.S. 982 (1982); *Jones v. Shipping Corp. of India, Ltd.*, 491 F. Supp. 1260, 1263 (E.D. Va. 1980) (stating that "Congressional intent was to provide a uniform, comprehensive scheme for adjudicating actions against foreign states in United States' courts").

48. 28 U.S.C. at § 1602.

vesting jurisdiction solely with the judiciary, Congress attempted to remove the specter of favoritism often present in decisions influenced by the U.S. Department of State.⁴⁹ The Act provided courts with legal standards by which to adjudicate foreign sovereign immunity decisions.

A second, related, purpose was to conform foreign sovereign immunity practice in the United States to that of other nations.⁵⁰ Although the United States purported to follow the restrictive theory of foreign sovereign immunity under the procedures of the Tate Letter, the United States was the only nation in the world to leave the decision-making in the hands of a political institution.⁵¹

A final purpose was to provide clear notice to foreign states regarding the application of the defense of foreign sovereign immunity in U.S. courts. This notice is important for foreign states that base their own application of sovereign immunity on the doctrine of reciprocity,⁵² because these states grant sovereign immunity in their courts to defendant foreign states in the same manner that the defendant foreign states grant foreign sovereign immunity.⁵³

49. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 13 *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611. The legislative history notes that the "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.*

50. *See supra* note 33 (discussing congressional intent that U.S. foreign sovereign immunities practice conform with practice of other nations); *see also* Von Dardel v. U.S.S.R., 623 F. Supp. 246, 253 (D.D.C. 1985) (stating that "[t]he Foreign Sovereign Immunities Act, like every federal statute, should be interpreted in such a way as to be consistent with the law of nations"). *See* H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 13, 17, *reprinted in* 1976 U.S.C.C.A.N. at 6613 (stating that decisions are to "be made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law"); Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 220, 251 (1952) (noting that "in the great majority of states in which there is an articulate practice on the subject the courts have declined to follow the principle of absolute immunity").

51. *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 25, 26-27 (1976)* (statement of Monroe Leigh, Legal Advisor, U.S. Department of State). Mr. Leigh testified that "[i]n virtually every other country in the world, sovereign immunity is a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs." *Id.* at 27.

52. MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 20, at 580-84 (1968) (discussing application of reciprocity principles in foreign countries).

53. *See* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964); Wil-

3. The Foreign Sovereign Immunities Act of 1976: Wide Scope and Attribution of Liability

The FSIA applies to actions involving "foreign states," a term that the Act defines broadly.⁵⁴ Thus, the FSIA recognizes sovereign immunity not only for foreign governments, but also for individuals who are sued in their official capacities.⁵⁵ The FSIA, however, does not affect the status of diplomatic or con-

liams v. Shipping Corp. of India, 489 F. Supp. 526, 528 (E.D. Va. 1980) (stating that "[i]n effect, a foreign nation is being accorded the same type . . . of reciprocal immunity we would like to be accorded in a foreign court"), *aff'd*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *see also* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1177 (1985) (stating that "[t]he United States does not plead sovereign immunity in foreign courts where a similar claim would not be recognized in the United States").

54. 28 U.S.C. § 1603(a) (1988). Section 1603(a) defines "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* An agency or instrumentality of a foreign state is

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.

Id. § 1603(b). *See* Marlowe v. Argentine Naval Comm'n, 604 F. Supp. 703, 706 (D.D.C. 1985) (stating that "FSIA substantially equates a 'foreign state' with an 'agent or instrumentality of a foreign state'"); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 398, 400 (E.D. Va. 1984). In *Unidyne*, the court held that

[f]or an entity to be a separate legal person pursuant to 28 U.S.C. § 1603(b) . . . the corporation, association, foundation, or other entity, must be capable of suing or being sued in its own name, of contracting in its own name, or of holding property in its own name under the law of the foreign state where it was created.

Id. Whether an entity is an "agent or instrumentality" pursuant to the FSIA such that it may invoke sovereign immunity for its own actions should not be confused with the question of whether the entity's acts can be attributed to the foreign state, thus making the foreign state itself liable for the entity's acts. *See supra* note 8 and accompanying text (discussing definition of attribution of liability).

55. 28 U.S.C. § 1603(a) (1988). *See e.g.*, *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990) (extending FSIA immunity to members of executive agencies of a foreign state); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D.N.Y. 1988) (extending FSIA immunity to an Under Secretary of Foreign Affairs); *American Bonded Warehouse v. Air France*, 653 F. Supp. 861 (N.D. Ill. 1987) (extending FSIA immunity to airline employees); *Mueller v. Diggelman*, No. 82 Civ. 5513 (S.D.N.Y. May 13, 1983) (extending FSIA immunity to judges and clerks of a foreign court); *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981) (extending FSIA immunity to officials of a state's labor organization). *But see* *Republic of the Philippines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (stating that "the terminology of [section 1603(b)]—'agency,'

sular officials, whose personal immunity from suit is controlled by international treaties.⁵⁶

The FSIA provides that courts have subject matter jurisdiction over an action only if it falls within an exception to immunity.⁵⁷ These exceptions include waiver of immunity,⁵⁸ suits involving commercial activity,⁵⁹ and suits involving personal injury; death; or damage to, or loss of, property.⁶⁰

Although the FSIA fully addresses the procedures for gaining personal and subject matter jurisdiction over a foreign state, the FSIA does not explicitly prescribe the substantive law that should apply to an action in which one of the exceptions applies.⁶¹ The Act provides that a foreign state not entitled to immunity shall be liable "in the same manner and to the same extent as a private individual under like circumstances."⁶² U.S. courts have universally interpreted this mandate to mean that the forum state's law of liability shall determine the liability of

'instrumentality,' 'entity,' organ—makes it clear that the statute is not intended to apply to natural persons").

56. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610. The legislative history of the Act states that "[t]he bill is not intended to affect . . . either diplomatic or consular immunity." *Id.* Consular and diplomatic immunity is determined by the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, and the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. *See* *Gerritsen v. Cordova*, 1988 U.S. Dist. LEXIS 17138 (D.D. Cal. 1988) (discussing immunity of consular officials under Vienna Convention). However, if a plaintiff seeks to attribute the acts of the diplomatic or consular official to the foreign state the issue is within the scope of the FSIA because in such cases the foreign government becomes the defendant. *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989).

57. *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480 (1983). In *Verlinden*, the Supreme Court held that "if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction." *Id.* at 485 n.5.

58. 28 U.S.C. § 1605(a)(1) (1988).

59. *Id.* § 1605(a)(2).

60. *Id.* § 1605(a)(5).

61. 28 U.S.C. §§ 1602-1611 (1988). *Bancec*, 462 U.S. 611, 620 (1983).

62. 28 U.S.C. § 1606 (1988). This provision on the extent of liability provides in pertinent part that

[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . .

Id.

a foreign state.⁶³

Courts are less consistent, however, in determining the law to apply in deciding whether the foreign state is amenable to suit based on the acts of another party.⁶⁴ The term "attribution of liability" evolved from the FSIA's legislative history.⁶⁵ Since the passage of the FSIA, U.S. courts have focused on a narrow aspect of the phrase—the imputation of liability to a foreign sovereign by means of the common law doctrines of agency or respondeat superior.⁶⁶ Although the term respondeat superior is usually used in the context of vicarious liability in a tort action, and agency in the context of a breach of con-

63. See, e.g., *Bancec*, 462 U.S. at 629 (holding that where state law provides rule of liability governing private individuals, FSIA requires application of that rule to foreign states in like circumstances); see also MICHAEL GRUSON & RALPH REISNER, *SOVEREIGN LENDING: MANAGING LEGAL RISK* 53 (1984) (stating that "after a foreign sovereign has been found amenable to suit in the United States, matters of contract interpretation and of choice of law do not require the application of a uniform body of law, i.e., federal common law"); CHRISTOPH H. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* 53-54 (1988) (discussing applicable law in tort actions brought against foreign sovereigns is *lex loci commissi* which "will invariably be the law of the forum State").

64. See, e.g., *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989); *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414 (D.D.C. 1983).

65. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 12 reprinted in 1976 U.S.C.C.A.N. 6604, 6610. The legislative history states that the FSIA is not intended to "affect . . . the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong." *Id.* "Attribution of responsibility" was soon misquoted and became "attribution of liability." *Bancec*, 462 U.S. at 622 n.11 (stating that "[t]he statute is silent, however, concerning the rule governing the attribution of liability among entities of a foreign state") (emphasis in original).

66. See *Bancec*, 462 U.S. 611, 629 (1983) (discussing attribution of liability in context of determining if foreign state so extensively controlled instrumentality that principal-agent-relationship was formed); *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 1989 U.S. Dist. LEXIS 4055, at *7 (D.D.C. May 5, 1989) (discussing attribution of acts of instrumentality to foreign state as issue of whether foreign state "exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit this court to deem [the foreign state] responsible for their actions"), *aff'd in part, remanded in part*, 905 F.2d 438 (D.C. Cir. 1990); see also *Gregorian v. Izvetsia*, 658 F. Supp. 1224, 1236 (C.D. Cal.), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Hester Int'l v. The Federal Republic of Nig.*, 681 F. Supp. 371, 376 (N.D. Miss.), *aff'd*, 879 F.2d 170 (5th Cir. 1989); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987); *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414 (D.D.C. 1983) (discussing *Bancec* and "allocation of liability" in context of respondeat superior).

tract action, both terms are very closely related to one another and are often used interchangeably.⁶⁷

The FSIA does not directly prescribe the law that is to apply in determining if an entity is an agent or servant of a foreign state for purposes of attributing liability.⁶⁸ In fact, U.S. legislators explained that the FSIA was not intended to affect "attribution of responsibility."⁶⁹ This attribution of liability, however, is often an integral part of an action brought pursuant to the FSIA if the foreign state is sued based on the acts or omissions of its purported agent.⁷⁰ In these cases, the court must answer the initial question regarding the attribution of liability before it can find that it has subject matter jurisdiction over the foreign state pursuant to the FSIA.⁷¹ For example, if an agent did not have the authority to contract on behalf of the principal foreign state, the court has no subject matter or personal jurisdiction over the foreign state under the FSIA.⁷²

67. See *supra* note 7 (discussing similarities between agency and respondeat superior).

68. See 28 U.S.C. § 1605(a)(5) (1988). The Act discusses respondeat superior in terms of obtaining subject matter jurisdiction over the foreign sovereign. *Id.* Section 1605(a)(5) states that a foreign state shall not be immune from the jurisdiction of the courts of the United States or States in any case

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment

Id. The Act is silent on the choice of law to be applied to determine these questions. 28 U.S.C. §§ 1602-1611 (1988).

69. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S.C.C.A.N. 6604, 6610. See *supra* note 65.

70. See, e.g., *Koepfel & Koepfel v. The Federal Republic of Nig.*, 704 F. Supp. 521 (S.D.N.Y. 1989) (holding that plaintiff may proceed against foreign state for acts of its consular officials).

71. See *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 447 (D.C. Cir. 1990) (stating that "absent an agency relationship, the court lacks subject matter jurisdiction over the foreign state for the acts of its instrumentality"); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982); *Texas Trading & Milling Corp. v. The Federal Republic of Nig.*, 647 F.2d 300, 314 (2d Cir.) (stating that "it is not only defendant's activities in the forum, but also actions relevant to the transaction by an agent on defendant's behalf, which support personal jurisdiction"), *cert. denied*, 454 U.S. 1148 (1982); *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 390 (S.D.N.Y.) (stating that "activities of an agent may be attributed to the principal for jurisdictional purposes"), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506 (1970).

72. *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 194 (2d Cir. 1989).

C. First National City Bank v. Banco Para El Comercio Exterior de Cuba

In 1983, the Supreme Court in *Bancec* rendered the sole decision in which it addressed the question of choice of law to determine attribution of liability in an action under the FSIA involving a suit between a New York bank and a Cuban bank.⁷³ In *Bancec*, the main issue before the Court concerned whether an instrumentality of the Cuban government could escape the sovereign's liabilities.⁷⁴ The determination of this question depended on the legal relationship between the defendant bank and the government of Cuba.⁷⁵

In 1960, Bancec was an official credit institution in Cuba with extensive connections to the Cuban government.⁷⁶ Bancec attempted to collect on a letter of credit issued by First National City Bank of New York.⁷⁷ Shortly after First National received Bancec's request, the Cuban government nationalized the Cuban properties of First National.⁷⁸ Bancec instituted a suit against First National to collect on the letter of credit, and First National counterclaimed, arguing that it had the right to

73. *Bancec*, 462 U.S. 611 (1983).

74. *Id.* at 619-20. See generally Raquel A. Rodriguez, Comment, *Holding Foreign Government Corporations Liable for the Wrongs of the Government: A Clash Among Competing Policies*, 39 U. MIAMI L. REV. 341 (1985).

75. *Bancec*, 426 U.S. at 613-14.

76. *Id.* The Supreme Court noted that

Bancec was established by Law No. 793, of April 25, 1960, as the legal successor to the Banco Cubano del Comercio Exterior (Cuban Foreign Trade Bank), a trading bank established by the Cuban Government in 1954 and jointly owned by the Government and private banks. Law No. 793 contains detailed "By-laws" specifying Bancec's purpose, structure, and administration. Bancec's stated purpose was "to contribute to, and collaborate with, the international trade policy of the Government and the application of the measures concerning foreign trade adopted by" . . . Cuba's central bank Bancec was empowered to act as the Cuban Government's exclusive agent in foreign trade. The Government supplied all of its capital and owned all of its stock. The General Treasury of the Republic received all of Bancec's profits, after deduction of amounts for capital reserves. A Governing Board consisting of delegates from Cuban governmental ministries governed and managed Bancec. Its president was . . . [the] Minister of State and president of Banco Nacional. A General Manager appointed by the Governing Board was charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute.

Id. (citations omitted).

77. *Id.* at 613.

78. *Bancec*, 462 U.S. 611, 614 (1983).

set off the amount seized by the Cuban government against the letter of credit.⁷⁹ After the suit commenced, the Cuban government dissolved Bancec and divided its capital among Banco Nacional, which also received all of Bancec's rights, claims, assets and obligations related to banking, and other governmental associations.⁸⁰

As an initial matter, the Supreme Court determined that Bancec was not entitled to sovereign immunity based on the counterclaim exception of the FSIA.⁸¹ After determining that Bancec was not immune, the Court considered the liability of Bancec for the acts of the Cuban government.⁸² The Court held that the liability of Cuba could be attributed to Bancec under the FSIA.⁸³ The Court did not apply choice of law rules, but rather followed its own two-step analysis.⁸⁴

First, the Court considered the extent to which the FSIA would influence its analysis. The question of the attribution of liability is a threshold question that the FSIA does not address.⁸⁵ The Court reasoned that the FSIA did not control the issue because the language and history of the FSIA provide that the Act does not affect the substantive law of liability nor the attribution of liability among instrumentalities of a foreign state.⁸⁶ Although the Court considered itself free of any FSIA-imposed constraints, it nonetheless stated that it remained cognizant of the congressional policies guiding the FSIA.⁸⁷

79. *Id.* at 615.

80. *Id.*

81. *Id.* The counterclaim exception of the FSIA provides in pertinent part that [i]n any action brought by a foreign state . . . in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1607(c) (1988). Because Bancec brought the suit against First National, and First National instituted a counterclaim for the amount of the set-off, the Court denied immunity to Bancec under the counterclaim exception. *Bancec*, 462 U.S. at 620-21.

82. *Bancec*, 462 U.S. at 621.

83. *Bancec*, 462 U.S. 611, 21 (1983).

84. *Id.* See Clyde H. Crockett, *Choice-of-Law and the Liability of Foreign States*, 4 *CONN. J. INT'L L.* 91, 119 (1988) (observing absence of choice of law analysis in *Bancec*).

85. 28 U.S.C. §§ 1602-1611 (1988).

86. *Bancec*, 462 U.S. at 622 n.11.

87. *Id.* at 621.

Second, the Court considered the law that would determine the question of Bancec's juridical status.⁸⁸ The Court began by rejecting the application of Cuban law, the law of the state that established Bancec.⁸⁹ Citing section 302 of the *Restatement (Second) of Conflict of Laws*, the Court held that the law of the state of incorporation does not apply to disputes involving the rights of third parties external to the corporation.⁹⁰

Bancec argued that the Court should apply the choice of law rules of the Federal Torts Claims Act (FTCA) because the FSIA contained a provision with language similar to a provision in the FTCA.⁹¹ The Supreme Court acknowledged that, like the FTCA, the FSIA states that a foreign state not entitled to immunity would be "liable in the same manner and to the same extent as a private individual under like circumstances."⁹² However, the Court distinguished the substantive law of liability from the law governing the attribution of liability.⁹³ It noted that the FSIA is silent regarding the law to apply to determine whether a foreign state is amenable to suit based on the acts of another party.⁹⁴ Citing the congressional policies seeking uniformity, the Court held that state common law

88. Bancec, 462 U.S. 611, 621 (1983).

89. *Id.* at 621-22.

90. *Id.* at 621 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971)). The Court noted that such a rule would "permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Id.* at 622; *but see* Morgan Guar. Trust Co. of New York v. Republic of Palau, 657 F. Supp. 1475 (S.D.N.Y. 1987) (applying law of Palau to determine whether President of Palau had acted *ultra vires* in pledging treasury of Palau in financing agreement).

91. *Id.* at 622. Compare 28 U.S.C. § 1606 (reprinted at *supra* note 62) with 28 U.S.C. § 2674 (stating that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages").

92. *Id.* at 622 n.11. Thus, the Court held that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* See Crockett, *supra* note 84, at 98 (stating FSIA extent of liability provision does not become operative until foreign state has been found liable). *But see* Desmond T. Barry, Jr., *Solving Choice of Law Problems In Foreign Sovereign Immunities Act Cases*, 55 DEF. COUNS. J. 255, 264 (1988) (stating that "section 1606 provides a general choice of law rule directing that the foreign state's liability is to be determined by the law of the place where the event giving rise to the liability occurred").

93. Bancec, 462 U.S. 611, 622 n.11 (1983).

94. *Id.*

should not apply in determining this question.⁹⁵ Thus, it also rejected New York common law.⁹⁶

After rejecting the laws of Cuba as the state that established the instrumentality, and New York common law as the law of the forum, the Court applied federal common law and international law.⁹⁷ In reaching this choice of law, the Court considered the practical effect of creating separate legal personalities such as Bancec.⁹⁸ The Court stressed that like a private corporation, a foreign state creates independent enterprises to promote economic development and limit liability.⁹⁹ Even though the Court had declined to apply the law of the state that created the instrumentality,¹⁰⁰ it found that both international law and the congressional intent expressed in the FSIA supported deference to Cuba's objectives in creating the instrumentality.¹⁰¹ Thus, the Court held, Bancec was a juridically separate governmental instrumentality because the government had established Bancec as a separate entity.¹⁰²

The Court did not end its analysis with its conclusion that Bancec was a juridically separate instrumentality under federal common and international law. The Court reasoned that even

95. *Id.* The Court stated that "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)). The Court also noted that "Congress expressly acknowledged the 'importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *Id.* (quoting H.R. REP. No. 1487, 94th Cong., 2d Sess. 1, 32, reprinted in 1976 U.S.C.C.A.N. 6604, 6631).

96. *Bancec*, 462 U.S. at 622 n.11.

97. *Id.* at 623. The Court stated that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* See Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 742 (1939) (stating that "[i]n all cases where the [U.S. Supreme Court] has had to apply international law, it has found the sources in 'the customs and usages of civilized nations; and as evidence of these [it has had resort] to the works of jurists and commentators'") (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

98. *Bancec*, 462 U.S. 611, 24-26 (1983).

99. *Id.* at 626.

100. See *supra* note 89.

101. *Bancec*, 462 U.S. at 626 n.18. The Court found authority for its position in decisions of British courts. *Id.* The Court also cited the legislative history of the FSIA, and in particular, the provision entitled "Exception to the Immunity from Attachment or Execution." *Id.* (citing 28 U.S.C. § 1610(b) (1988)).

102. *Bancec*, 462 U.S. at 628.

if *Bancec* was presumed to be separate under local law, this presumption might be overcome if *Bancec* is under government control to the extent that a principal-agent relationship might be said to exist.¹⁰³ The Court invoked internationally recognized equitable principles in stressing that it would not give effect to the corporate form if doing so would result in an injustice or fraud.¹⁰⁴ Applying these principles to the case, the Court concluded that blind adhesion to the corporate form would permit the foreign state to benefit unfairly from the juridically separate status of its instrumentality.¹⁰⁵ The Court thus found that *Bancec* was accountable for the acts of the government of Cuba.¹⁰⁶

II. CONFLICTING CHOICES OF LAW

Many courts have followed *Bancec* in applying federal common law to determine whether the acts of an agent can be attributed to the foreign state.¹⁰⁷ One court, however, declined to apply federal common law to the agency question.¹⁰⁸ In contrast to these cases concerning agency relationships are the cases concerning respondeat superior, another, very similar, method of attributing liability to a foreign state for the acts of

103. *Bancec*, 462 U.S. 611, 29 (1983) (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 (1960)). See *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926) (Cardozo, J.) (holding that "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent").

104. *Id.* at 629-30 (citing *Anderson v. Abbot*, 321 U.S. 349, 362-63 (1944); *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939); *Pepper v. Littion*, 308 U.S. 295, 310 (1939)). See *De Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) (stating that "message [of *Bancec*] is that foreign states cannot avoid their obligations by engaging in abuses of corporate form"), *cert. denied*, 471 U.S. 1125 (1985). The Court stated that the decision

announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.

Bancec, 462 U.S. at 633-34.

105. *Id.* at 633.

106. *Id.*

107. See *infra* notes 118-25 and accompanying text (discussing cases applying federal common law).

108. See *infra* notes 128-59 and accompanying text (discussing *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*).

its servants.¹⁰⁹ All courts faced with the respondeat superior issue have held that state common law controls.¹¹⁰

A. *Federal Common Law Approach*

In the aftermath of *Bancec*, courts and commentators have disagreed regarding the propriety of applying the choice of law rule established in *Bancec* to all attribution of liability issues.¹¹¹ In *Bancec*, the Supreme Court applied federal common law to determine whether a juridically separate, wholly-owned government corporation could escape the liabilities of its government.¹¹² The plaintiff sought to attribute the liabilities of the principal foreign state to its agent in an action brought against the agent.¹¹³ In these “downward attribution”¹¹⁴ cases, courts uniformly apply federal common law to determine if a princi-

109. See *supra* note 7 (discussing similarities between respondeat superior and agency).

110. See *infra* notes 160-75 and accompanying text (discussing respondeat superior cases).

111. Some commentators have subscribed to the position that the choice of law rule in *Bancec* applies to all attribution of liabilities issues. See, e.g., William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 *TUL. L. REV.* 535, 577 (1991) (stating that “[a]llocation issues are governed by international and federal common law”). Others disagree. See MICHAEL WALLACE GORDON, *FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS* § 6.19 (1991) (discussing *Bancec*’s choice of law rule as limited to veil piercing); GRUSON & REISNER, *supra* note 63, at 53 (stating that the rule of *Bancec* concerns “whether the separate juridical status of an instrumentality of a foreign state should be respected by a U.S. court”). See Rodriguez, *supra* note 74 (criticizing as too narrow *Bancec*’s substantive holding on attribution of liability); Irene Cannon-Geary, Comment, *Piercing the Veil of Foreign Trade Organizations*, 23 *COLUM. J. TRANSNAT’L L.* 483 (1985) (criticizing *Bancec* for not providing guidance to courts as to when to pierce the corporate veil of juridically separate government instrumentalities); Mark M. Christopher, Note, *Piercing the Corporate Veil Between Foreign Governments and State Enterprises: A Comparison of Judicial Resolutions in Great Britain and the United States*, 25 *VA. J. INT’L L.* 451 (1985) (criticizing *Bancec* for its lack of standards); Ronald D. Lee, Comment, *Jurisdiction Over Foreign States for Acts of Their Instrumentalities: A Model for Attributing Liability*, 94 *YALE L.J.* 394, 401 (1984) (criticizing *Bancec* because “[t]he ambiguity of the FSIA, the undeveloped nature of federal common law, and uncertainty about the application of equitable principles raise the danger that decisionmakers will invoke equity in ways difficult to predict or regularize”).

112. *Bancec*, 462 U.S. 611, 632-34 (1983).

113. *Id.* at 621.

114. The author of this Note employs the terms “upward” and “downward” attribution of liability to illustrate the differences and similarities among post-*Bancec* cases. “Downward” attribution of liability occurs when the acts of the foreign state are attributed to its servant or agent. “Upward” attribution is the reverse, when the acts of the servant or agent are attributed to the foreign state.

pal-agent relationship exists between the foreign state and its instrumentality.¹¹⁵

In contrast, the situation that is the reverse of *Bancec* arises in most FSIA cases. "Upward attribution" of liability occurs when litigants seek to attribute the liability of the instrumentality to the foreign state based on the common law doctrine of agency.¹¹⁶ Courts have reached inconsistent results in these upward attribution cases.¹¹⁷

Typical of the upward attribution cases following *Bancec* is *Foremost-McKesson, Inc. v. Islamic Republic of Iran*.¹¹⁸ In *Foremost-McKesson*, a U.S. business sued the government of Iran, alleging that the government had acted through its agents and instrumentalities to exclude it from the management of the company and to withhold the U.S. business' share of earnings.¹¹⁹

The district court denied the defendants' motion to dis-

115. See, e.g., *Hercaire Int'l, Inc. v. Arg.*, 821 F.2d 559 (11th Cir. 1987) (applying federal common law to determine whether foreign state's waiver of immunity applied to wholly owned corporation under doctrine of agency); *De Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) (applying rules of *Bancec* to determine whether liabilities of foreign state may be raised against national airline), *cert. denied*, 471 U.S. 1125 (1985).

116. See, e.g., *First Fidelity Bank, N.A. v. Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989).

117. Compare *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990); *Hester Int'l Corp. v. The Federal Republic of Nig.*, 879 F.2d 170, 177 (5th Cir. 1989) (applying federal common law when imputing acts of Nigerian corporation and political subdivision to government of Nigeria); *Kalamazoo Spice Extraction Company v. Provisional Military Government of Socialist Eth.*, 616 F. Supp. 660, 666 (W.D. Mich. 1985) (applying federal common law when imputing minimum contacts for personal jurisdiction of Ethiopian corporation to government of Ethiopia) with *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989) (declining to apply federal common law to agency issue).

118. 905 F.2d 438 (D.C. Cir. 1990).

119. *Id.* at 439. An earlier action brought by the plaintiff was dismissed pursuant to an U.S. Executive Order which required that the Iran-United States Claims Tribunal first consider the claims. *Id.* at 441. The Claims Tribunal eventually ruled partially in plaintiff's favor based on claims accruing until 1981. *Id.* The court in *Foremost-McKesson* noted that

the Claims Tribunal concluded that interference with Foremost's rights had not, by January 19, 1981, amounted to an expropriation. However, the Claims Tribunal concluded that Pak Dairy had unlawfully withheld from Foremost cash dividends declared in 1979 and 1980, and it therefore awarded Foremost approximately \$900,000, plus interest, against Iran. The Claims Tribunal also concluded that Pak Dairy unlawfully failed to deliver to Foremost stock certificates representing stock dividends declared in 1980 and that Pak Dairy had breached contractual obligations in failing to pay

miss the action for lack of subject matter jurisdiction under the FSIA.¹²⁰ The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's opinion in part, but remanded it on the question of the choice of law used to determine attribution of liability.¹²¹ Under the Algiers Accord, Iran is liable for the acts of its governmental agencies or instrumentalities if the government is a majority shareholder and has majority control of the board of directors.¹²² The court of appeals found these factors to be relevant in determining whether the government of Iran could be held liable for the acts of its agencies or instrumentalities; however, it did not believe that the factors were conclusive.¹²³ Citing *Bancec's* deference to the foreign state's need to create instrumentalities with separate legal identities, the court held that *Bancec's* choice of law rule controls.¹²⁴ The court of appeals ordered the district court to apply federal common law and principles of international law to determine this attribution of liability question.¹²⁵

rental payments due and to return upon demand certain machines to Foremost.

Foremost-McKesson, 905 F.2d at 441 (citations omitted). Plaintiff revived its action against the defendants for damages arising from expropriations made after January 19, 1981. *Id.* at 442.

120. *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 1989 U.S. Dist. LEXIS 4055 (D.D.C. 1989).

121. *Foremost-McKesson*, 905 F.2d at 446. The court stated that we conclude that the question of attribution under FSIA is not, as the District Court concluded, the 'same question, or at least a very similar' question to the one decided in *Foremost's* favor by the Claims Tribunal. Thus, we must remand to the District Court so that it may make further factual determinations in light of the more rigorous attribution standard required by FSIA.

Id. at 445-46 (citation omitted).

122. Algiers Accords, art. VII 3, *reprinted in* 20 INT'L LEGAL MATERIALS 223 (1981).

123. *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990). The court stated that "[m]ajority shareholding and majority control of a board of directors, without more, are not sufficient to establish a relationship of principal to agent under FSIA. See, e.g., *Bancec*, 462 U.S. at 614, 620-21, 623, 103 S. Ct. at 2593, 2596-97, 2598 (looking to principles of international law and federal common law to determine when instrumentalities should not be treated as distinct from the sovereign—though the government owned all the stock and appointed delegates from governmental ministries to all positions on the Governing Board)." *Id.*

124. *Id.* The FSIA contains a presumption "that a foreign state and agencies and instrumentalities thereof are separate juridical identities under FSIA." *Id.*

125. *Id.* at 448.

B. State Common Law Approach

In contrast to *Bancec* and its progeny are the cases applying state common law to determine attribution of liability. These cases fall into two categories. The first category is characterized by the decisional approach of the U.S. Court of Appeals for the Second Circuit which has invoked state common law to determine whether an agent possessed apparent authority to contract on behalf of his principal.¹²⁶ The second category involves the decisions in which courts have consistently applied state common law rather than federal common law to determine questions of respondeat superior despite the fact that respondeat superior and agency are closely related doctrines.¹²⁷

1. Agency

In contrast to *Bancec* and *Foremost-McKesson*, the U.S. Court of Appeals for the Second Circuit has endorsed the position that state common law controls the determination of agency issues in FSIA cases.¹²⁸ In *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, a 1989 decision, the Second Circuit “assumed without deciding” that state common law controls principal-agent relationships.¹²⁹

The “agent” in *First Fidelity* was an ambassador to the United Nations from Antigua & Barbuda.¹³⁰ The ambassador borrowed US\$250,000 from a commercial lender ostensibly for the purpose of renovating his country’s Permanent Mission in New York City.¹³¹ He signed the loan agreement in his capacity as ambassador to the United Nations,¹³² but subse-

126. See *infra* notes 128-59 and accompanying text (discussing *First Fidelity Bank, N.A. v. The Government of Antigua & Barbuda—Permanent Mission*).

127. See *infra* notes 160-75 and accompanying text (discussing respondeat superior cases).

128. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989).

129. *Id.* at 194 n.3.

130. *Id.* at 191-92. The full title of the ambassador was “Ambassador Extraordinary and Plenipotentiary” and he occupied the highest rank in diplomacy, as established by the Congresses of Vienna (1815) and Aix-la-Chapelle (1818). *Id.* at 192.

131. *Id.* at 191.

132. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 191 (2d Cir. 1989). Ambassador Jacobs signed the loan agreement as ambassador, “representing the ‘Government of Antigua & Barbuda—Permanent Mission.’” *Id.*

quently used the money for personal purposes.¹³³

After the ambassador ceased repayment on the loan, plaintiff bank commenced a suit against the Government of Antigua & Barbuda.¹³⁴ The bank obtained a default judgment pursuant to the FSIA¹³⁵ from the district court and sought to freeze Antigua & Barbuda's bank accounts in New York.¹³⁶ Nine months after the default judgment was entered in favor of the bank, the ambassador wrote to the district court acknowledging the debt.¹³⁷ The ambassador and the bank then entered into a settlement agreement and a signed consent order which waived the defense of sovereign immunity.¹³⁸ The ambassador signed the agreement on behalf of the Government of Antigua & Barbuda in his official capacity.¹³⁹

Four months after signing the consent order, the ambassador again defaulted on the settlement agreement.¹⁴⁰ Again, First Fidelity moved to attach a New York account held by the Government of Antigua & Barbuda and to attach accounts held by the Government of Antigua & Barbuda in Washington, D.C.¹⁴¹ In defending against the attachment, the Government of Antigua & Barbuda took its first action in the case.¹⁴² The sovereign moved to dismiss the case for lack of subject matter jurisdiction under the FSIA, or in the alternative, to vacate the consent order.¹⁴³

The Government of Antigua & Barbuda argued that the ambassador lacked authority either to sign commercial loans

133. *Id.* at 197 (Newman, J., dissenting). After borrowing the money, "[Ambassador Jacobs] subsequently used the funds for construction of a casino resort in Antigua, in which he and other officials of the Antiguan government held ownership interests." *Id.*

134. *Id.* at 191.

135. Brief for Appellee at 2, 6-7, *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.*—Permanent Mission, 877 F.2d 189 (2d Cir. 1989) (No. 88-7863).

136. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.*—Permanent Mission, 877 F.2d 189, 197 (2d Cir. 1989).

137. *Id.* at 191-92.

138. *Id.* at 191.

139. *Id.* The agreement was also signed by an individual who stated he was an attorney for the Government of Antigua & Barbuda. *Id.*

140. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.*—Permanent Mission, 877 F.2d 189, 191 (2d Cir. 1989).

141. *Id.* The bank account in New York contained only US\$500.00. *Id.*

142. *Id.*

143. *Id.*

on behalf of the government or to consent to the settlement.¹⁴⁴ Thus, the foreign government claimed that it was not bound by the ambassador's acts because they were beyond the scope of his authority.¹⁴⁵ The district court denied the motion, and the government appealed.¹⁴⁶

One issue on appeal was whether the ambassador possessed the requisite authority to borrow money on behalf of the government.¹⁴⁷ The bank argued that the ambassador, by virtue of his high diplomatic standing, possessed either actual or apparent authority to bind his government to both the loan agreement and the subsequent consent order.¹⁴⁸ The court rejected this broad view of authority which would bind the government solely on the basis of the ambassador's high diplomatic position.¹⁴⁹ Instead, the court discussed the powers and sources of power of diplomatic officials as an issue of agency.¹⁵⁰ The court cited section 207(c) of the *Restatement (Third) of Foreign Relations*,¹⁵¹ which discusses the liabilities of a state for the actions or inactions of its employees or agents.¹⁵² Because this section applies elements of agency law, the court held that the relationship between the ambassador and his

144. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 191 (2d Cir. 1989).

145. *Id.*

146. *Id.* The court applied "agency law to hold Antigua could not interpose sovereign immunity . . . because the loan fell within the Foreign Sovereign Immunity Act's commercial activity exception." *Id.*

147. *Id.* at 190-91.

148. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 191 (2d Cir. 1989).

149. *Id.* at 192. The court held that "[w]e do not believe . . . that a person's position as ambassador, and nothing more, should be dispositive in this case, let alone all cases." *Id.* at 192.

150. *Id.* at 192-94.

151. *Id.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 207 states that "[a] state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 207 (1987). The court pointed out that the Restatement would not apply to the situation at hand because breach of a commercial contract is not a violation of international law "unless the breach is discriminatory, or it occurs for governmental rather than commercial reasons and the state is not prepared to pay damages for the breach." *First Fidelity*, 877 F.2d at 193 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712(2) cmt. h & Reporters' Note 8).

152. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 193 (2d Cir. 1989).

home country was properly understood as one of agent and principal.¹⁵³

Having defined the issue as one of principal-agent, the court proceeded to the choice of law question.¹⁵⁴ The court concluded that it would apply the agency law of New York.¹⁵⁵ The court noted that it was "assuming without deciding" that state common law controls; however, it nonetheless rejected the application of federal common law in its decision.¹⁵⁶ In support of its position that state common law applied, the court cited *Bancec* for the proposition that the FSIA does not affect the substantive law determining the liability of a foreign state.¹⁵⁷

In applying the law to the facts, the court held that although the ambassador's official title was not dispositive as to his authority, it was an element to be considered in determining whether the bank had been reasonable in relying on the authority under New York agency law.¹⁵⁸ The circuit court

153. *Id.*

154. *Id.*

155. *Id.* The court held that "[t]he facts of a given case must be examined, and the agency law of developed states, here our own, provides the proper framework for that examination." *Id.* Although the majority cited *Bancec* for the proposition that "the [FSIA] does not affect the substantive law determining the liability of a foreign state," it failed to discuss the subsequent holding of *Bancec* that federal common law controlled attribution of liability. *Id.* at 194 n.3. See *supra* note 86. The majority rejected federal common law, but stated that "we do not believe that the federal common law rule, were we to follow the suggestion in [Judge Newman's dissent], would be any different." *Id.*

156. *First Fidelity Bank, N.A. v. The Government of Ant. & Barb.—Permanent Mission*, 877 F.2d 189, 194 n.3 (2d Cir. 1989).

157. *Id.*

158. *Id.* at 194. In his dissenting opinion, Judge Jon O. Newman was most concerned with the implications of the majority's choice of law determination. *Id.* at 197 (Newman, J., dissenting). Judge Newman wrote that

[t]hrough foreign states, if amenable to suit in this country, may, in most circumstances, be obliged to accept state substantive law that normally applies to such matters as contracts and creditors' rights, they are entitled to expect that this country will have a uniform body of federal law that determines those issues of agency law that implicate relationships between a foreign government and its ambassador accredited within this country.

Id. Judge Newman argued that foreign states are entitled to expect that the United States has a uniform body of federal law to determine attribution of liability, particularly when these questions affect diplomatic relations. *Id.* at 197. Citing *Bancec*, Judge Newman stated that because the FSIA was silent and no other legislation addressed the issue, federal common law was appropriate to determine attribution of liability. *Id.* Judge Newman observed that under the majority's view, New York com-

remanded the case, ordering the district court to examine the circumstances of the transaction to determine whether the person relying on the apparent authority fulfilled his "duty of inquiry."¹⁵⁹

2. Respondeat Superior

Like the question of agency, the doctrine of respondeat superior involves the attribution of liability to the foreign state.¹⁶⁰ The FSIA, however, indirectly mentions the doctrine of respondeat superior.¹⁶¹ All courts that have addressed this choice of law question agree that state common law controls with respect to respondeat superior based on an analogy between language in the FTCA and the FSIA.¹⁶²

The respondeat superior cases evolve from a pre-FSIA decision completely unrelated to the issue of sovereign immunity for foreign governments. In 1955, over twenty years prior to the passage of the FSIA, the Supreme Court held in *Williams v. United States*¹⁶³ that under the FTCA, state law principles of respondeat superior control in determining whether a soldier had acted within the scope of employment.

The first case concerning the choice of law in respondeat superior issues under the FSIA was *Castro v. Saudi Arabia*.¹⁶⁴ In *Castro*, the District Court for the Western District of Texas considered whether Saudi Arabia could be sued under the FSIA for a car accident negligently caused by an off-duty Saudi Arabian soldier in Texas.¹⁶⁵ Citing *Williams*, the court concluded

mon law required that the bank exercise a duty of inquiry to the principal foreign state. *Id.* Foreign states would not welcome such an inquiry from a U.S. vendor, he argued. *Id.*

159. *Id.* at 195 (citing *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472, 299 N.E.2d 659, 664, 346 N.Y.S.2d 238, 244 (1973)).

160. *See supra* note 7 (discussing similarities between respondeat superior and agency).

161. 28 U.S.C. § 1605(a)(5) (1988). *See supra* note 68 (stating text of § 1605(a)(5)).

162. *See, e.g.*, *Joseph v. Office of Consulate General of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987) (stating that "[t]he 'scope of employment' provision of the tortious activity exception [of the FSIA] essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals"), *cert. denied*, 485 U.S. 905 (1988).

163. 350 U.S. 857 (1955).

164. 510 F. Supp. 309 (W.D. Tex. 1980).

165. *Id.* at 311.

that it should apply state common law to determine whether the soldier was acting within the scope of his duty when the accident occurred.¹⁶⁶

Three years later, the District of Columbia District Court relied on *Castro* in *Skeen v. Federative Republic of Brazil*.¹⁶⁷ In *Skeen*, the grandson of the Brazilian ambassador to the United States had assaulted and shot the plaintiff outside a nightclub.¹⁶⁸ The court considered whether the tortious acts of the ambassador's grandson could be attributed to the government of Brazil, thereby making it liable for damages under the FSIA.¹⁶⁹ The court cited *Castro* for the proposition that state law controlled on this point.¹⁷⁰ The court pointed out that the federal interests implicated in foreign sovereign immunity questions are limited.¹⁷¹ Thus, the court held that if a state's law provides a rule of civil liability such as assault and battery, the court should follow the applicable state law.¹⁷²

166. *Id.* The court did not provide a rationale for its application of FTCA principles to the FSIA, nor did it discuss the preemptive powers of the FSIA. See *supra* notes 43-45 and accompanying text (discussing preemptive effect of FSIA).

167. 566 F. Supp. 1414 (D.D.C. 1983).

168. *Id.* at 1416.

169. *Id.*

170. *Id.* at 1417.

171. *Id.* The *Skeen* court held that

[t]he [Supreme] Court [has] held that federal interests in foreign affairs and regulation of foreign commerce provide sufficient basis for federal jurisdiction in all cases against foreign states, including those that involve no substantive federal issues beyond the question of sovereign immunity. However, as a general rule, only the purely federal question of sovereign immunity is to be decided on the basis of federal law

Id. But see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1963) (holding that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law").

172. *Id.* To support this proposition, the court cited *Bancec*, 462 U.S. 611, 622 n.11 (1983). *Bancec* stressed, however, that the question of attribution of liability is a separate matter. *Id.* In *Skeen*, the court misquoted the critical language in *Bancec* and characterized the Supreme Court opinion regarding the attribution of liability as a question of "allocation of liability among instrumentalities." *Id.* Rather than "allocation of liability," the Supreme Court referred to "attribution of liability." *Id.* The distinction between the two words is critical. "Allocate" means "to apportion for a specific purpose to particular persons or things." WEBSTER'S NEW COLLEGIATE DICTIONARY 30 (1981). "Attribute" means "to regard as a characteristic of a person or thing." *Id.* *Skeen's* conclusion that it could not "allocate" because there was only one defendant before the court was an incorrect characterization of *Bancec*. The correct term, however, is attribution, and attribution does not depend on the number of

In *Skeen*, the court reasoned that there was no question of allocating liability among multiple parties because the foreign state was the only defendant.¹⁷³ Citing *Bancec*, the court held that federal common law applies only to the purely federal question of sovereign immunity and not to the rules of liability.¹⁷⁴ Finally, the court looked to *Castro*'s choice of law and applied state common law to the case.¹⁷⁵

III. A PROPOSAL FOR APPLYING FEDERAL COMMON LAW

U.S. courts should apply federal common law whether the attribution of liability to foreign states is accomplished on the basis of agency or respondeat superior. First, although Congress did not specifically mandate that federal common law apply to determine the attribution of liability, the intent of the Act, the goal of reciprocity among nations, and the provisions of the FSIA support the application of a uniform federal common law for determining the attribution of liability. Second, the decisions that have applied state common law have done so as a result of a misinterpretation of language common to both the FTCA and the FSIA. Finally, the application of divergent principles is antithetical to standards of international law.

A. Congressional Intent Indicates That Courts Should Apply Federal Common Law to Determine the Attribution of Liability

The legislative history of the FSIA is replete with refer-

defendants before the court. *But see* Barry, *supra* note 92, at 261 (approving of *Skeen*'s analysis of *Bancec*).

173. *Skeen*, 566 F. Supp at 1417 n.4. The court held that "[n]o such allocational issue arises in this case, in which the state of Brazil is the sole defendant and none of its corporate instrumentalities or political subdivisions has been sued." *Id.*

174. *Id.* at 1417.

175. *Id.* Subsequent to *Skeen*, other cases have relied on its authority to support their conclusion that state common law controls with respect to the issue of respondeat superior. *See, e.g.*, *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (applying state common law in suit between widow of Taiwanese historian and Republic of China for wrongful death and damages to widow), *cert. denied*, — U.S. —, 111 S. Ct. 27 (1990); *Joseph v. Office of Consulate General of Nig.*, 830 F.2d 1018, 1020 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (applying state common law in suit between landlord and office of Consulate General of Nigeria, Federal Republic of Nigeria and consular officials for damages caused by consular officials who had leased plaintiff's home).

ences to the goal of uniformity.¹⁷⁶ Arguably, if the goal of uniformity were to be followed to its extreme, courts should apply a single body of law with respect to substantive issues of liability such as torts or contract rights. However, no court has taken such a broad approach to uniformity. In fact, in *Bancec*, the Court expressly noted that with respect to "substantive issues of law" courts should apply the appropriate state common law.¹⁷⁷

However, the issue of uniformity is critical when determining the amenability of a foreign sovereign to suit based on the acts of its employees or agents.¹⁷⁸ In this narrow context, uniformity by means of the application of federal common law serves a two-fold purpose. First, foreign governments and government-owned businesses invest heavily in the United States, and the foreign governments conducting business in the United States must act through a network of agents or employees.¹⁷⁹ At any given time, the foreign state may not know the location of these representatives. If courts applied state common law to determine whether the acts of these agents or servants are attributable to the foreign state, the foreign state may be subject to liability based on possibly fifty divergent rules of respondeat superior or agency.¹⁸⁰

Second, the application of a uniform body of law provides

176. See *supra* notes 46-53 and accompanying text (discussing congressional goal of uniformity).

177. *Bancec*, 462 U.S. 611, 623 n.11 (1984) (stating that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances").

178. By essentially applying two separate bodies of law to the same action, courts will be using the choice of law technique known as *dépeçage*. See generally Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973). Professor Reese writes that

[d]épeçage occurs where the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate the other issues. The technique permits a more nuanced handling of certain multistate situations and thus forwards the policy of aptness.

Id.

179. See Steve D. Bezirgianian, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1989*, in SURVEY OF CURRENT BUSINESS, May 1990, at 23.

180. See *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1212 (5th Cir. 1991) (stating that "[d]isunity is directly proportional to the number of authorities speaking on any subject"). *But see* GAMAL MOURSİ BADR, STATE IMMUNITY: AN ANALYTIC AND PROGNOSTIC VIEW 88 (1984). Mr. Badr argues that foreign states do not need notice of a single standard because they choose to conduct

notice to foreign states that practice reciprocity. When it enacted the FSIA, Congress recognized the implications associated with decisions involving foreign sovereign immunity.¹⁸¹ The legislators were aware that some foreign states based their system of sovereign immunity on reciprocity.¹⁸² If U.S. courts apply state common law to determine attribution of liability, foreign states will not know whether they are subject to the liability of their instrumentalities until after the harm has occurred. When an instrumentality or agent of the United States appears as a defendant in an action in the foreign state's courts, the foreign state will subject the United States to the same ambiguity regarding the defense of sovereign immunity, if the state practices reciprocity. To avoid this problem, courts should apply federal common law to determine the limited question of attribution of liability.

Some courts have not been swayed by the degree to which

business in the United States and should therefore be subject to the laws of the United States as are private individuals. Mr. Badr argues that

[i]t should make no difference whether the party to a transnational relationship of private law is a foreign state or a foreign individual or juristic person. A state embarking on transnational activities normally governed by private law should be expected to realize, as a private party in the same circumstance is expected to realize, that a foreign law may turn out to be the proper law of the relationship it is entering into or that a foreign court may turn out to have jurisdiction over a dispute resulting from such a relationship. Vague and unspecific arguments based on sovereignty or on dignity are alien to situations of this type. States overly jealous of their "sovereignty" or of their "dignity" will be well advised simply to abstain from intruding into the juridical sphere of other states by having transnational dealings with nationals of those states.

Id.

181. See *supra* note 49. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1963). In *Sabbatino*, a pre-FSIA case, one of the parties was a foreign sovereign. *Id.* at 398. The Court held that federal common law controlled with respect to the determination of the choice of law in evaluating the act of state doctrine. *Id.* at 427. The Court stated that

we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. . . . [Professor Philip C. Jessup] recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations.

Id. at 425 (citations omitted).

182. See *supra* notes 52-53 and accompanying text (discussing reciprocity).

Congress desired uniformity.¹⁸³ On the other hand, Congress's deafening silence with respect to the question of the determination of the choice of law, particularly concerning attribution of liability, arguably can lead to the opposite conclusion. Nonetheless, congressional intent is discernable through both the legislative history and some provisions of the FSIA that suggest the application of federal common law.¹⁸⁴ For example, the FSIA eliminated all traditional restrictions of citizenship and amount in controversy and simplified the process for removing a case from the state to the federal system.¹⁸⁵ By channeling law suits brought against foreign states into the federal courts, Congress has created the optimum situation for the application of federal common law to determine attribution of liability issues.

B. The Argument That the Choice of Law Rules of the FTCA Should Apply to the FSIA Is Misguided

Some courts have argued, particularly in the context of a tort action brought under the FSIA, that because the FSIA contains language similar to that in the FTCA, the choice of law rules of the FTCA should apply in FSIA actions.¹⁸⁶ This argument is flawed for three reasons. First, this reasoning relies on questionable authorities. Second, the argument misinterprets a provision of the FSIA. Finally, the FTCA and FSIA are not analogous because the FTCA, unlike the FSIA, does contain a specific choice of law provision.

The first case that discussed the FTCA-FSIA analogy was

183. *See, e.g., Barkanic v. General Administration of Civil Aviation of the P.R.C.*, 923 F.2d 957 (2d Cir. 1991). The court in *Barkanic* rejected statements in the legislative history with respect to the goals of "uniformity of decision," stating that the "Extent of liability" provision expressly embraced "the goal of holding foreign states liable 'in the same manner and to the same extent as a private individual under like circumstances.'" *Barkanic*, 923 F.2d at 960 n.3. "Under these circumstances, we do not believe that Congress intended to achieve 'uniformity of decision' by applying different choice of law standards to foreign defendants and private parties." *Id.*

184. *See supra* notes 46-53 and accompanying text (discussing Congressional desire for uniformity).

185. *See supra* notes 37-39 and accompanying text (discussing subject matter jurisdiction and removal provisions).

186. *See supra* notes 160-75 and accompanying text (discussing respondeat superior cases).

Castro v. Saudi Arabia.¹⁸⁷ *Castro*, however, relied on a pre-FSIA, non-foreign sovereign immunities case.¹⁸⁸ Moreover, because the FSIA preempted the existing body of foreign sovereign immunity law at its inception,¹⁸⁹ the validity of this line of cases is dubious.

The second weakness of this argument is that it misconstrues the language of the FSIA.¹⁹⁰ Although the "Extent of liability" provision of the FSIA might appear to represent a choice of law provision, it is not such a provision.¹⁹¹ In *Bancec*, the Supreme Court held that the "Extent of liability" provision refers only to rules of financial liability, and not to rules regarding the amenability of a foreign sovereign to suit based on the acts of its agents.¹⁹² Thus, reliance on this provision is inappropriate as a basis on which to determine the limited question of the attribution of liability.

Finally, as a general matter, the analogy between the two acts is not wholly appropriate. Although the FSIA and FTCA contain some similar language, the FTCA specifically contains a choice of law provision whereas the FSIA does not contain such a provision.¹⁹³ Other courts have rejected the argument

187. See *supra* notes 164-66 and accompanying text (discussing *Castro v. Saudi Arabia*).

188. See *Williams v. United States*, 350 U.S. 857 (1955); see *supra* notes 167-75 (discussing authorities cited in *Castro v. Saudi Arabia*).

189. See *supra* notes 43-45 (discussing preemptive authority of FSIA).

190. See *Skeen v. Federative Republic of Braz.*, 566 F. Supp. 1414, 1417 n.5 (D.D.C. 1983) (noting that the "extent of liability" sections are nearly identical in FTCA and FSIA). See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 21, reprinted in 1976 U.S.C.C.A.N. 6604, 6620. The legislative history states that "the [claims against which foreign states are immune] provided in subparagraphs (A) and (B) of 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h)." *Id.*

191. See *supra* notes 91-96 and accompanying text (discussing "Extent of liability" provision).

192. *Bancec*, 462 U.S. 611, 622 n.11 (1983).

193. 28 U.S.C. § 1346(b) (1988). Section 1346(b) of the FTCA provides, in pertinent part, that when the United States government is a defendant

the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

in favor of such a FTCA-FSIA analogy for this reason in other contexts.¹⁹⁴

C. Importance of International Law

In order that U.S. foreign sovereign immunity jurisprudence reflect the standards of international law, federal common law should determine the attribution of liability under the FSIA. Unlike many other nations, governmental power in the United States is shared among a central, federal authority and its constituent territorial units.¹⁹⁵ Nonetheless, Congress stated that by passing the FSIA it sought to conform U.S. practice with that of other countries.¹⁹⁶

In addition to this tension between the federal system in the United States and the uniform systems of other countries, the legislative history of the FSIA states that the Act incorporates standards recognized under international law.¹⁹⁷ The Supreme Court has also relied on international law as one of the sources of its rule with respect to the attribution of liability in *Bancec*.¹⁹⁸ Thus, U.S. courts have invoked international law to define commercial activities of a foreign government¹⁹⁹ and

Id. See *Barkanic v. General Administration of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959 (2d Cir. 1991) (stating that “[i]t was this general choice of law provision [of the FTCA], and not the provision on punitive damages, that was the basis for the Supreme Court’s determination that the FTCA requires courts to apply the law of the place of the act or omission”).

194. See, e.g., *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987). In *Harris*, the court held that “the FTCA contains an explicit choice of law provision; there is no such provision in the FSIA The upshot is that the FSIA lacks a section corresponding to FTCA § 1346(b).” *Id.*

195. See *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 36* (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice). Mr. Ristau testified that “[t]he system of federalism, as we know it, the closest I can think of, you would find perhaps in Switzerland. But in all of the other countries in which suits are brought against the United States, we simply do not encounter these problems of State-Federal relationships.” *Id.*

196. See *supra* note 33.

197. See *supra* note 40 (discussing standards of international law).

198. *Bancec*, 462 U.S. 611, 623 (1983).

199. See, e.g., *Texas Trading & Milling Corp. v. The Federal Republic of Nig.*, 647 F.2d 300, 309 (2d Cir. 1981) (referring to the legislative history, pre-FSIA cases and international law as the “three separate sources of authority to resolve this fundamental question”). The court also noted, however, that

[s]ection 1602 of the Act, entitled “Findings and declaration of purpose,”

to determine whether an entity is an agent or instrumentality of a foreign state.²⁰⁰

Although courts have relied on international law in limited circumstances,²⁰¹ U.S. courts should consider further the practice of other nations. At its core, attribution of liability is the process whereby foreign states are held liable for the acts of their agents or servants. The rules of law applied by U.S. courts to define the relationship between a foreign state and its agents or servants have transnational ramifications.²⁰² As a result, the choice of law rule employed by U.S. courts to determine the attribution of liability is not purely of domestic concern.²⁰³

IV. CONCLUSION

In 1788, Alexander Hamilton wrote that “[t]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”²⁰⁴ His admonition remains valid two centuries later. Through the FSIA, Congress sought to conform the foreign sovereign immunities practice of the United States with the practices of other nations. U.S. courts

contains a cryptic reference to international law, but fails wholly to adopt it. The legislative history states that the Act “incorporates standards recognized under international law,” and the drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations.

Id. at 310 (citations omitted). The court implied that the omission of the phrase “and other principles of international law” from the end of § 1602 in the original version of the bill meant that the FSIA did not intend to embrace these international law principles. *Id.* at 310. The court did not discuss the testimony of witnesses who stated that the 1973 and 1976 versions were virtually identical with the exception of technical corrections. *See supra* note 18 (discussing original FSIA legislation).

200. *See, e.g.*, *Bancec*, 462 U.S. 611 (1983).

201. *See supra* notes 199-200.

202. *See* GORDON A. CHRISTENSON, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 321, 322 (Richard B. Lillich ed. 1983). Mr. Christenson argues that “[i]t is essential [] if states are to be held accountable for wrongful conduct, that the international community define what action properly is attributable to them.” *Id.* Indeed, Mr. Christenson decries the use of private law terms such as respondeat superior and agency arguing that use of these terms avoids “key questions about the conduct of States in a larger world context.” *Id.*

203. *Id.* at 346. Mr. Christenson states that “[a]ll nations use the [doctrine of attribution] to clarify their own conduct in relation to the international community and international law.” *Id.*

204. THE FEDERALIST No. 80, 406 (A. Hamilton) (B. Blackwell 2d ed. 1987).

should apply federal common law to determine whether a foreign sovereign is amenable to suit in U.S. courts for the acts of its agents or servants. Invoking state law to determine attribution of liability may be an expedient approach to resolving cases, but in the long run it both undermines the purposes of the FSIA and unnecessarily impairs the good will of foreign states toward the United States.

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