UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 11 | Number 1 Article 6

Winter 1986

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I. Introduction

The Foreign Sovereign Immunities Act of 1976 (FSIA)[1] greatly expanded the permissible bases of jurisdiction of U.S. courts in suits against "foreign states,"[2] including foreign nation-states and their agencies and instrumentalities. Foreign states are suable when engaged in broadly defined commercial activities,[3] as well as for certain tort[4] and admiralty claims,[5] for expropriations in violation of international law,[6] and in circumstances where sovereign immunity has been "waived."[7]

Once a court has determined that it has jurisdiction of a suit against a foreign state, the substantive rights and obligations of the parties are next adjudicated. It is likely that one of the parties might assert that the law of the foreign state addressing those issues applies. For example, the plaintiff may contend that under such law the defendant is liable or the defendant may assert that its law absolves it of any liability. The purpose of this article is to discuss the role of foreign municipal law in the imposition of liability on a defendant state, and the extent to which the application of that law is currently limited in FSIA cases.

The extent to which a U.S. court will refer to foreign municipal law depends on the law of the United States, including the FSIA. In an earlier publication,[8] this author concluded that the FSIA offered very little guidance on the law governing issues of liability and certainly nothing specifically on the role of foreign municipal law. It

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[1] Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)).

[2] 28 U.S.C. § 1603(a) (1982).

[3] The commercial activity exception is codified at *id.* § 1605(a)(2).

[4] *Id.* § 1605(a)(5).

[5] *Id.* § 1605(b).

[6] *Id.* § 1605(a)(3).

[7] *Id.* § 1605(a)(1).

[8] Crockett, *Choice of Law Aspects of the Foreign Sovereign Immunities Act of 1976*, 14 LAW R. POL'Y INT'L BUS. 1041 (1983).

appeared at that time that whether and to what extent the law of the defendant state applies depended on other rules of law, particularly rules derived from federal common law.

This new study is prompted by a 1983 decision of the United States Supreme Court, *First National City Bank v. Banco para el Commercial Exterior de Cuba* ("Bancec"),[9] in which the Court indicated that section 1606 of the FSIA requires, under circumstances present in most FSIA cases, that "state law" be applied to determine the liability of foreign states. Before addressing the significance of that case on the applicability of foreign municipal law, the article first identifies the rules of federal common law that bear upon the application of foreign municipal law and various policies relevant to that question.

II. Validity of Acts of Foreign States

Under the aegis of federal common law a number of rules have been developed to deal with the legal effects of "acts of state." An "act of state" may be defined as an act (or omission) attributable to a foreign government in furtherance of the public interest of that government.[10] Typically, this involves the exercise of the power of eminent domain, or, as it is more commonly characterized, expropriation of property. Other examples include currency regulations, immigration controls, and "other acts of a governmental character."[11]

In a long series of cases,[12] U.S. courts have consistently refused to inquire into the validity of the acts of state under the law of the acting state, when it is alleged that such law renders the act invalid or illegal. In reaching this result, courts have relied upon the "act of state" doctrine, which, in its classic formulation, provides as follows: "[T]he courts of one country will not sit in judgment of the acts of the government of another done within its own territory."[13] While the doctrine has been applied to bar inquiry under other standards,[14] in *Underhill v. Hernandez*[15] the plaintiff based his claim for relief on the contention that a foreign government official had acted illegally under the law of the foreign government.

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[9] 462 U.S. 611 (1983).

[10] *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 comment d (1965).

[11] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 469 (Tent. Draft No. 6, 1985).

[12] *See, e.g.*, Union Shipping & Trading Co. v. United States, 127 F.2d 771 (2d Cir. 1942); Eastern States Petroleum Co. v. Asiatic Petroleum Co., 28 F. Supp. 279 (S.D.N.Y. 1939).

[13] Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See also* Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918).

[14] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); *infra* notes 18-27 and accompanying text.

[15] 168 U.S. 250 (1897).

Underhill and other formative cases viewed the doctrine as rooted in the independence of sovereign states and the obligation of the United States to respect that independence. From this vantage, sitting in judgment of an act of state performed within the actor's own territory was considered to be an interference with exclusive sovereign authority. Such a "highly offensive"[16] act would "imperil amicable relations between governments and vex the peace of nations."[17] In *Banco Nacional de Cuba v. Sabbatino*,[18] however, the view that the doctrine is based upon notions of sovereign independence was rejected, and the Supreme Court redefined the rationale for the doctrine:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expressed the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both of itself and for the community of nations as a whole in the international sphere.[19]

Sabbatino involved various challenges to an expropriation of property in Cuba, including the contention that the act violated international law and it was not in compliance with the law of Cuba. The Court, on the basis of the newly announced rationale, held:

> Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[20]

As to the international law contention, the Court noted two principal reasons for barring inquiry: the lack of consensus as to relevant rules of the international law of expropriation and the implications for foreign policy that such an inquiry might entail.[21] Nevertheless, the Court indicated that the permissibility of entertain-

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[16] Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals . . . should not be called in question by the legal tribunals of another jurisdiction . . . . It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.

Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897). *See also* Detjen v. Central Leather Co., 246 U.S. 297, 303 (1918).

[17] *Underhill*, 65 F. at 579.

[18] 376 U.S. 398 (1964).

[19] *Id.* at 423.

[20] *Id.* at 428.

[21] *Id.* at 428-33.

ing challenges to acts of state on the basis of international law depends on the circumstances, such as the degree of consensus surrounding the standard sought to be applied and the potential implications the decision would have upon the conduct of foreign policy.[22]

As to the municipal law contention, the Court gave the following reasons for refusing to determine the validity of the expropriation under Cuban law:

> The courts below properly declined to determine if issuance of the expropriation decree complied with the formal requisites of Cuban law. In dictum in *Hudson v. Guestier*, 4 Cranch 293, 294, Chief Justice Marshall declared that one nation must recognize the act of the sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state. This principle has been followed in a number of cases. See, *e.g., Banco de Espana v. Federal Reserve Bank*, 114 F.2d 439, 444 (C.A. 2d Cir.); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249 (C.A. 2d Cir.); *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (D.C.S.D.N.Y.). But see *Canada Southern R. Co. v. Gebhard*, 109 U.S. 527; cf. *Fremont v. United States*, 17 How. 542 (United States successor sovereign over land); *Sabariego v. Maverick*, 124 U.S. 261 (same); *Shapleigh v. Mier*, 299 U.S. 468 (same). An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question. Of course, such review can take place between States in our federal system, but in that instance there is similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.
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> Another group supports the resolution of this problem in the courts below. Were any test to be applied it would have to be what effect the decree would have if challenged in Cuba. If no institution of legal authority would refuse to effectuate the decree, its "formal" status—here its argued invalidity if not properly published in the Official Gazette in Cuba—is irrelevant. It has not been seriously contended that the judicial institutions of Cuba would declare the decree invalid.[23]

Within the context of the *Sabbatino* facts, these conclusions are justifiable, given the strained relations between the United States and Cuba and the fact that deciding the issue would require a U.S.

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[22] *Id.* at 428. The Court explained:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . .

Id.

[23] *Id.* at 415 n.17.

court to find and apply the eminent domain law of Cuba. In some imaginable cases, however, it is arguable that applying the law of the foreign state would be relatively simple and, even if the result would be adverse to the foreign state, it would not be particularly offensive. In other words, it is plausible that such approach might not, in some circumstances, run afoul of the rationale of the act of state doctrine; however, it is questionable whether the Court meant to leave open that possibility. The quoted passage suggests few circumstances in which the application of foreign law would be permissible. The inapplicability of foreign law is not limited to the specific circumstances underlying *Sabbatino*, in territorial or subject-matter terms, but is rather cast in "inflexible and all-encompassing" terms.[24] Additionally, the Court's citation of the *Banco de Espana* and *Bernstein* cases is revealing.

In *Banco de Espana* the court refused to determine the validity of an act of state under the law of a foreign government, even though the foreign sovereign urged that its law be applied, and under such law, its act was illegal.[25] In *Bernstein* the Court refused to embark upon that inquiry although the State Department had indicated its approval.[26] Indeed, in both cases the governments whose acts were questioned were, at the time of the case, no longer in existence. The Court's reliance on these cases, coupled with the expansive terminology employed, not only suggests that the door is virtually closed[27] on the sitting in judgment of acts of state under the actor's own law, but further suggests that the rule has gained a life of its own apart from the act of state doctrine. Unlike a case in which a U.S. court declares that an act of state is invalid under international law, or that it runs afoul of domestic public policy, there is something peculiarly

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[24] 376 U.S. at 428.

[25] 114 F.2d at 443.

[26] 163 F.2d at 249.

[27] Under *Sabbatino* the doctrine would not bar an inquiry where the applicable legal principles are contained in a treaty or other unambiguous agreement. Conceivably, the United States and a foreign state might agree in a treaty that the law of the foreign state will be applied in judicial proceedings in the United States against the foreign state. Such a possibility, however, is extremely remote.

An agreement with a private entity might provide that the validity of particular acts of state will be determined by reference to the law of the foreign state. Such an agreement would not specify the substantive rules and would not remove the potential for insult. Because the *Sabbatino* opinion concentrates almost exclusively on the propriety of adjudging an act under international law, it is evident that the reference was meant only to include agreements that fall clearly within the domain of public international law, *i.e.*, treaties and other *international* agreements. Given the Court's concern that the applicable rules not be ambiguous or controversial, the agreement should contain clearly enunciated standards, not mere references to a body of law, such as "international law" or the "law of Cuba." *Sabbatino*, 376 U.S. at 428. *Cf.* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 469 comment b (Tent. Draft No. 6, 1985). *See also id.* Reporter's note 5.

presumptuous about a U.S. court finding that a foreign government has not complied with its own law, or that its act is invalid.

In *Sabbatino* the act at issue was done within the territory of the acting government. The act of state doctrine is, by its terms, inapplicable to acts of state which are done or purport to apply extraterritorally; nevertheless, cases decided before and after *Sabbatino* have given effect to such acts as long as such acts are not contrary to U.S. public policy,[28] and even though the acting state allegedly has not complied with its own law.[29]

Although the Supreme Court has never addressed the validity of the territorial limitation on the act of state doctrine, the reasoning of *Sabbatino* suggests that a court would not necessarily be permitted to determine the validity of an extraterritorial act of state under the law of the acting state. The mere fact that an act of state is done outside the territory of the actor does not render the municipal law question less difficult nor ameliorate the potential offensiveness of an incorrect decision.

III. Liability for Acts Attributable to Foreign States

The *Sabbatino* rule is limited to public or sovereign acts and to the judicial investigation of such acts under the municipal law of the acting state. In FSIA cases, foreign municipal law might play other roles. For example, in cases in which the liability of the defendant state does not turn upon the validity *vel non* of an act of state, foreign municipal law may assist in evaluating the consequences of such act. Alternatively, other situations may arise where, because of an exception to or limitation on the act of state doctrine, the act of state has been found to be invalid and the question arises as to the legal consequences of such a finding. Additionally, the act may not be classified an "act of state" and the court must determine the liability for such act. Before the enactment of the FSIA, the liability of foreign nation-states was addressed by Congress and the courts.

Shortly after *Sabbatino* was decided, Congress provided in the second Hickenlooper Amendment to the Foreign Assistance Act[30] that courts are precluded from applying the act of state doctrine to certain foreign expropriations in violation of international law. Courts were instructed to give "effect to the principles of international law"[31] in determining the merits of such suits. The directive

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[28] *See, e.g.*, Vladikavkazsky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934).

[29] *See, e.g.*, Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942). *See also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

[30] 22 U.S.C. § 2370(e)(2) (1982).

[31] *Id.*

did not preclude courts from applying the law of the involved state to determine issues of liability; however, the application of foreign municipal law was not required by Hickenlooper. Rather, the directive gives the courts a wide latitude of discretion in arriving at the legal consequences of such illegal expropriations. Although in the few cases[32] decided under the Amendment it is nearly impossible to determine the source of the law applied and what effect the law of the taking state might have played in those determinations, none of the decisions precluded the application of foreign municipal law.

Apart from the Hickenlooper Amendment, the Supreme Court decided two cases in the pre-FSIA era that raised issues of the liability of foreign states. In *First National City Bank v. Banco National de Cuba*[33] the Court held that the act of state doctrine was not a bar to determining the validity of a foreign expropriation in circumstances in which a claim for relief was in the form of a defendant's counterclaim.[34] In such circumstances, according to the three-member plurality, liability is determined by "otherwise applicable legal principles."[35] Because this was the only guidance provided by the Court, the question lingers as to where and how these principles are to be found. Although such a general statement provides little guidance in determining the applicable law, it contemplates the application of the law of the involved foreign states. On remand,[36] however, the court held that Cuba was liable to the extent of its principal claim without identifying the source of its rule of decision on liability.

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*[37] Dunhill asserted claims for recovery of an overpayment for a sale of tobacco made to Dunhill by Cuban cigar manufacturers whose businesses had been expropriated by the Cuban government. Dunhill received a shipment of tobacco before the expropriation, but at the time of the expropriation had not made payment. Dunhill made payment to "interventors" appointed by Cuba to manage the manufacturing. It was determined in other litigation that the expropriation did not include accounts receivable and that Dunhill was liable to the former owners. Therefore, Cuba and the interventor intervened in the proceedings to recover payment for all post-expropriation shipments of cigars. Dunhill crossclaimed for the overpayment. Cuba argued that its refusal to repay the amount it had received from Dunhill was an "act of state" and that the act of state doctrine required the court to

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[32] *See, e.g.*, Banco Nacional de Cuba v. Farr, 272 F. Supp. 836 (S.D.N.Y. 1965).

[33] 406 U.S. 759 (1972).

[34] *Id.* at 767, 768.

[35] *Id.* at 768.

[36] Banco Nacional de Cuba v. First Nat'l City Bank, 478 F.2d 191 (2d Cir. 1973).

[37] 425 U.S. 682 (1976).

give effect thereto.[38]

The majority of the Supreme Court disagreed, stating that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign nation determined to confiscate the amounts due . . . foreign importers."[39]

Four members of the majority took the position that even if Cuba attempted to confiscate the payment or officially repudiated an obligation of the interventors to return the payment, the act of state doctrine did not protect Cuba from liability. The doctrine does not extend to acts arising out of purely commercial transactions. The rationale for this exception is that in commercial affairs, the foreign government is not acting in its sovereign capacity, and should therefore be treated in the same manner as a private individual engaged in similar transactions.[40] Under these circumstances, the applicable law would consist of "rules of international law . . . with regard to the commercial dealings of private parties in the international market."[41]

If the reference is to the rules governing the rights and obligations of international persons *inter se* that are part of the law of the United States,[42] under the plurality position in *Dunhill*, the internal law of Cuba would be irrelevant to the issue of liability. If international law required that Cuba return the overpayment and required further that municipal courts enforce Cuba's obligation, U.S. courts could not, consistent with international law, entertain a defense that Cuban law did not require repayment. Similarly, if Cuba agreed by

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[38] *Id.* at 687.

[39] *Id.* at 695.

[40] *Id.* at 704-05. Concerning the applicable laws the Court said:

> In their commercial capacities, foreign governments do not exercise power peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to these same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves." Moreover, as this Court has noted:
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> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. . . . There may be little codification or consensus as to the rules of international law concerning exercises of *governmental* powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market. The restrictive approach to sovereign immunity suggests that these established rules should be applied to the commercial transactions of sovereign states.

Id.

[41] *Id.*

[42] *The Paquete Habana*, 175 U.S. 677 (1900).

treaty with the United States to observe certain standards respecting commercial transactions with U.S. citizens, and by further agreement the parties stipulated that U.S. and Cuban municipal courts would enforce the treaty standards, Cuban municipal law to the contrary would be irrelevant.[43]

The plurality apparently had another form of international law in mind: a quasi-autonomous body of law referred to as the law of international trade, or international commercial law.[44] This body of law consists of rules derived from the customs and practices of participants in international commercial transactions and from public international law.[45] For example, through a treaty, nation-state parties might agree to apply particular rules relating to the rights and obligations of the parties to certain kinds of contracts. Though solutions by convention provide a possibly ideal resolution of disputes arising in international commercial transactions, few conventions exist and those in effect are limited in scope.[46] Moreover, it is not clear whether nation-states, though parties to such treaties, are themselves bound by the rules of these conventions.

If there is no solution by convention under the law of international trade, trade customs and practices furnish the rules of decision. These practices can be incorporated into U.S. law either by legislative action or through federal common law, as suggested by the *Dunhill* plurality. Neither method, however, precludes the resort to an internal rule of municipal law if the reference is no more specific than "the law of international trade," as in *Dunhill*. In international contracts, parties often agree to the law governing their

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[43] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3(2) (1965). Under the FSIA provisions, a plaintiff might seek relief because his injury is attributable to an act of a foreign state in violation of international law. International law would then be relevant to determine whether a basis for liability exists. If a court finds that the foreign state has violated international law, the foreign state should not be permitted to excuse its violation on the ground that it has complied with its own municipal law. When the question of liability is reached, however, international law usually does not address the specific issue of a nation-state's liability to a private individual. Rather, the rule of international law is generally that the United States may treat the violation of international law in any way it sees fit under its municipal laws. Thus, a U.S. court could apply the law of a foreign state that, for example, completely exonerates the foreign state.

Although in some limited areas, such as human rights, international law may possibly afford private individuals direct rights against nation-states that could be enforced in municipal courts, such situations are highly unlikely to arise in FSIA cases. Indeed, it is unlikely that there will be any allegation of international law violations outside § 1605(a)(3).

[44] The authorities the Court cited and its reference to "rules . . . with regard to the commercial dealings of private parties," *Alfred Dunhill*, 425 U.S. at 704, support this interpretation. *See id.* at 730 n.17.

[45] *See* Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

[46] *See, e.g.*, Draft Convention on Contracts for the International Sale of Goods, 18 INT'L LEGAL MATERIALS 644 (1979). The United States is not a party to the International Contracts Convention nor to the various Hague Conventions which relate to international business transactions. *See* 24 INT'L LEGAL MATERIALS 1750 (1985).

transactions, but absent agreement, the applicable law is derived from the parties' intentions, and other choice-of-law devices potentially leading to the use of municipal rules of a contact jurisdiction.

Neither *Citibank, Dunhill* or the Hickenlooper Amendment preclude the application of the law of the respondent state to the issue of liability. In neither of these cases, however, nor in cases decided under Hickenlooper was it contended that the law of the foreign state was applicable and rendered the respondent liable. Had that issue been directly confronted, the reasoning of *Sabbatino* might well have led to a limiting rule. To be sure, *Sabbatino* would not be directly on point, for the opinion addressed only the permissibility of determining the validity of public acts under foreign municipal law. Determining the liability of a foreign nation under its own law, however, is presumably fraught with a great deal of difficulty, and, if an incorrect decision on the question of validity is offensive to a foreign state, a much more devastating decision as to the liability of that state may be presumed to be equally or more offensive.

A similar argument could be made with respect to the imposition of liability in other circumstances. Although from the U.S. viewpoint, an act attributable to a state is not an "act of state," from the standpoint of a foreign state, any act that it engages in may be viewed as involving a strong and important public interest. The mere fact that a public act is not involved does not necessarily mean that the interpretation of the applicable foreign law is somehow rendered less difficult.

Although the policies and concerns expressed in *Sabbatino* suggest a limited role for the law of foreign states, the above discussion is directed to the situation analogous to *Sabbatino*, in which the plaintiff or counter-claimant contends that the foreign state is liable under its own law. This is not the only situation in FSIA cases that raises the question of the relevance of foreign law. For example, the defendant might contend that its own law is applicable and that under that law it is not liable or is otherwise favored. This issue was presented to the Supreme Court in *Bancec*,[47] which involved the issue of liability of a Cuban bank, Bancec, for Cuba's illegal expropriation of property belonging to Citibank. Under Cuban law, Bancec had been created as a juridical entity separate from the state and was allegedly not liable under Cuban law for the obligation of the Cuban government. Rejecting the contention that under conflicts of law principles the law of Cuba was applicable, the Court said:

> To give conclusive effect to the law of the chartering state in determining whether the separate juridicial status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively

[47] 462 U.S. at 611.

> insulating itself from liability in foreign courts. We decline to permit such a result.[48]

Bancec adds another factor to be considered in determining the permissibility of deferring to the law of the foreign state. If such law is to be applicable, it would be unfair to the typical entity suing the foreign state, because the adverse party would have the power to adjust its laws to ensure a favorable position. In other words, the foreign state would have the ultimate control over the outcome on issues of liability.[49] Adding this consideration to those associated with *Sabbatino* suggests a very limited role for the law of the foreign state. On the basis of "comity,"[50] however, the *Bancec* Court carved out what might be described as a "preference." Under *Bancec*, when the issue is the attribution of liability among entities of a foreign state, the law of the foreign state is to be preferred unless principles of equity between international law and federal common law call for a different result.

Although the Court was careful to limit the holding to the precise issue, and although *Sabbatino* was concerned only with questions of validity, both cases suggest that the general approach to the question of the role of the law of the foreign state will develop along the following guidelines: Whether and to what extent such law will be applied will depend upon an evaluation of a complex mixture of factors including comity, the degree of difficulty in interpreting foreign law, the potential offensiveness in applying that law (which would turn in part upon the particular issue involved), the fairness to the parties, and the impact of such a decision on foreign policy considerations. This view of the future role of foreign municipal law is based primarily upon cases decided under a regime of federal common law. With the apparent sensitivity of the Court to the imposition of liability on foreign states, the fact that such determinations may have adverse implications on the international relations of the United States, and the need for uniformity, to assume that federal common law will

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[48] *Id.* at 621-22.

[49] *See* Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co. (Arbitral Award of Mar. 15, 1963), 35 INT'L L. REP. 136, 171 (1967) (Cavin, Arb.).

[50] 462 U.S. at 626. The Court said:

> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of a sovereign to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by a foreign sovereign and for principles of comity between nations, . . . leads us to conclude—as the courts of Great Britain have concluded in other circumstances—that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

Id. at 626-27 (citations omitted).

continue to be the source of rules of decision might be unwarranted. The Supreme Court in *Bancec* indicated in dictum that the FSIA required that in most situations, such decisions are governed by state law. In response to the contention that the law of New York governed the issue of liability, the *Bancec* Court said:

> Pointing out the 28 U.S.C. § 1606 . . . contains language identical to the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2674 . . . Bancec also contends alternatively that the FSIA, like the FTCA, requires application of the law of the forum state—here New York—including the conflict principles. We disagree. Section 1606 provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." Thus, 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. The statute is silent, however, concerning the rule governing the attribution of liability among entities of a foreign state. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425, 11 L.Ed.2d 804, 84 S. Ct. 923 (1964), this Court declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretation." When it enacted the FSIA, Congress expressly acknowledged "the importance of developing a uniform body of law" concerning the amenability of a foreign sovereign to suit in the United States courts. H.R. Rep. No. 94-1487, p. 32. See Verlinden B.V. v. Central Bank of Nigeria, — U.S. —, —, 76 L.Ed.2d 81, 103 S. Ct. —(1983). In our view, these same considerations preclude the application of New York law here.[51]

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[51] *Id.* at 622 n.11. The Court's interpretation of § 1606 is questionable in view of the legislative history contained in H.R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as HOUSE REPORT]. The HOUSE REPORT expressly states that Congress did not intend to affect the substantive law of liability. *Id.* at 12. To hold that § 1606 requires that state law rather than federal common law be applied to issues of liability contradicts the express legislative intent. *See* Dellapenna, *Suing Foreign Governments and Their Corporations: Choice of Law*, 86 COM. L.J. 210 (1981). "The section is deceptively simple. Notably lacking is any indication of how the appropriate rules of law to govern liability are to be selected. The operative phrases ('same manner,' 'same extent,' and 'like circumstances') could mean almost anything." *Id.* at 211.

The comments in the HOUSE REPORT on § 1606 are not to the contrary. They are, in full, as follows:

> Section 1606. Extent of Liability
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> Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International law, 723-26 (1943); Garcia-Amador, State Responsibility, 94 Hague Recueil des Cours 365, 476-81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. *Cf.* 46 U.S.C. 743, 745.
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> Consistent with this section a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is

While the regime of federal common law renders the applicability of

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not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply. Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

HOUSE REPORT, *supra*, at 22-23.

As indicated in the commentary, § 1606 provides that the liability of a foreign state exists for a private party under like circumstances. When a private person has been found liable to respond in damages or in specific performance, such liability may be enforced through procedural devices of *lex fori*, with both right and remedy subject to choice of law rules. *Accord* Williamette Transp., Inc. v. Cia. Anonima Venezolana de Navegacion, 491 F. Supp. 442 (E.D. La. 1980).

Section 1606 is closely patterned after a section of the FTCA, 28 U.S.C. § 2674 (1982), which provides similar rules for tort claims against the United States. That section, however, is preceded by a rule for which there is no counterpart in the FSIA. Section 1346(b) of the FTCA provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for . . . 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.

28 U.S.C. § 1346(b) (1982).

Thus, by analogy to the FTCA, "like circumstances" would mean the situation where a foreign state has been found nonimmune and eventually liable. The legislative hearings include the following statement which tends to confirm the view that the substantive order of decision would be determined apart from any provision in the then proposed act:

> It is contemplated that in actions brought in the federal district courts under this new § 1330 or removed to the federal courts under the new § 1391(f), whether state or federal law is to be applied will depend on the nature of the issue before the court. Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is nonfederal. On the other hand, federal law will be applied if the issue is a federal matter. Under the new chapter 97 issues concerning sovereign immunity, of course, will be determined by federal law.
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> Similarly, issues involving the foreign relations law of the United States, such as the act of state doctrine, should be determined by reference to federal law. Other issues which may arise in actions brought under the new §§ 1330 and 1391(f) may be determined by state law if the issue is one of state law.

Immunities of Foreign States: Hearings Before the Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary, 93d Cong., 1st Sess. 46 (1973).

Three cases illustrate the divergent judicial interpretations of § 1606. In Skeen v. Federal Republic of Brazil, 566 F. Supp. 1414 (D.D.C. 1983), the court, relying on *Bancec*, assumed that § 1606 required application of the law of the District of Columbia. The court did not discuss the choice of law rules of the District of Columbia nor of Brazil, as neither party raised the issue.

Gaspler v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983), examined whether a federal statute was applicable to the defendant, an agency of India. The court was of the opinion that § 1606 required that if a federal statute applies to private persons, it applies to foreign states, if the statutory conditions are met. Though a statutory provision might be inter-

the law of the foreign nation uncertain in a number of situations, there is at least some assurance that the development of rules under such approach would be based on the various factors identified above. Under a state law regime, whether and the extent to which such factors will influence the decision is highly conjectural.

Extant state choice-of-law rules do not by their terms exclude or require *per se* the application of the law of a defendant foreign state. They have developed, however, almost exclusively in respect to determination of liability in strictly private interstate transactions. Moreover, it is highly questionable whether a state law regime will lend itself to the same degree of uniformity as a federal common law regime. Choice-of-law rules vary greatly from state to state. For example, it would not be surprising to find that in the same case, foreign national law would be applicable under the New York approach, but would be inapplicable under the choice-of-law rules of New Jersey.[52]

IV. Conclusion

The act of state doctrine precludes the application of the law of the foreign state to determine the validity of such an act. Although the doctrine does not expressly preclude the determination of liability under the acting state's law, the policies underlying the doctrine suggest that U.S. courts will not determine the liability of foreign states under their own law. When the defendant state asserts that an exonerating rule of its law, is applicable, the Supreme Court requires that such law be applied unless federal common law requires another result. The Supreme Court has indicated that the FSIA requires that in other situations state law will determine the applicable law.

Although the applicability of foreign law in the federal courts depends on various factors evaluated with respect to the particular circumstances, it is questionable whether and to what extent such circumstances would be relevant under state law. Nevertheless,

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preted as applying to a foreign state and/or its agencies and instrumentalities, it is incorrect to base an interpretation on § 1606. The correct approach is demonstrated in International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1983), where, without mentioning § 1606, the court held that the Sherman Act, which applies to "any person," did not apply to foreign nation-states.

In Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980), the court held that Chile was liable for damages for wrongful death, citing § 1606 and the wrongful death provision of the law of the District of Columbia. The case is not edifying as to the proper application of § 1606, for the judgment was by default, and there was no contention that law other than that of the District of Columbia was applicable.

If § 1606 does not require the application of the state conflict of laws rules, the Supreme Court might well mandate a choice of law approach, patterned after some existing state methodology, to arrive at a rule of decision in FSIA cases.

[52] *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980), for a description of the numerous choice-of-law approaches currently being employed by state courts.

those factors might be appropriate guidelines in a state law regime until more definite, uniform rules emerge. The uncertainty of such an approach is offset by the realization that an FSIA case is always politically sensitive, even if the defendant state is being sued for a "simple" breach of contract. Regardless of what the foreign nation has done, it is likely that its act is perceived by it as an attempt to promote an important public interest. To determine that a foreign state is liable under its own law or to refuse to take into account its exonerating law may have adverse consequences on the relations between that foreign state and the United States. This is not to suggest that a foreign state should always be considered immune, but rather to indicate that the relevance of foreign law is a question that should be approached cautiously and with the same care that U.S. courts have shown in evaluating the validity of acts of foreign nations.