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WHEN MAY A SOVEREIGN BE HELD LIABLE FOR THE ACTS OF HER INSTRUMENTALITIES UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT? THE EFFECT OF THE MCKESSON DECISION

I. INTRODUCTION

When are the acts of an instrumentality attributed to a sovereign under the Federal Sovereign Immunities Act (FSIA)? This topic has been addressed numerous times in the U.S. court system, with the majority of cases refusing to hold the sovereign responsible for the actions of her instrumentalities. The thrust of those holdings found that the principal lacked the necessary degree of control over the instrumentality to attribute liability. One exception to these holdings is Foremost-McKesson v. Islamic Republic of Iran (McKesson).

This case note will focus on the District Court's recognition of the necessary degree of control by Iran over her co-defendant entities. It will discuss the exceptions of the FSIA and how they were applied in the instant case to hold that Iran was attributable for her co-defendants. Finally, this note will examine the potential problems that may arise from this decision, such as subjecting U.S. parties and the United States to foreign jurisdiction.

The law today has changed significantly because of the ten-year journey of the Iranian government, McKesson, and the instrumentalities involved in the instant suit. When in suit with a foreign nation, plaintiffs have a much higher

3. There are several exceptions to sovereign immunity included in the FSIA. 28 U.S.C. § 1605 (1988).
burden, for they must prove a principal/agent relationship between the foreign government and the alleged instrumentality. However, the standard for the commercial activities exception of the FSIA has become easier to satisfy. These issues will always be questions of fact for the court, thus allowing for highly arbitrary rulings in order to satisfy the requirements.

A. Procedural Background

In November of 1979, a group of terrorists invaded the American Embassy in Tehran, capturing United States' diplomatic personnel and holding them hostage. President Carter responded to this act by declaring a national emergency on November 14, 1979, and froze all interests of the government of Iran and her instrumentalities. On January 19, 1981, President Carter entered into an agreement negotiating the release of the American hostages in Tehran. This agreement is known as the Algiers Accords and consists of two parts. The first section of the agreement negotiated the release of the hostages, while the second created the Iran-United States Claims Tribunal (Tribunal) to resolve settlements between Iran and the United States. The Treaty authorized the Tribunal to arbitrate any claims not settled within six months and to render "final and binding" decisions "enforceable" in any court of any nation party to the agreement.

After an extremely lengthy procedural background, McKesson will be able to have their claim resolved in a U.S. court. On remand from the D.C. Court of Appeals, the U.S. District Court (Court) addressed the issue of whether the government of Iran exercised the necessary degree of control over the other co-defendants to create a principal/agent relationship so as to permit the Court to deem Iran responsible for their actions. With the extremely factual determinative rule of law used to resolve this issue, it is not surprising that the Court found there to be the necessary degree of control.

Foremost contended that Iran, acting through her instrumentalities, was responsible for losses connected with McKesson's partial ownership interest in Sherkat Sahami Labiniat Pasteurize Pak (Pak Dairy). The co-defendant instrumentalities included (1) the Foundation for the Oppressed (Foundation), (2) the Financial Organization for the Expansion of Ownership of Industrial Units (Financial Organization), (3) the National Investment Company of Iran (NICI), (4) the Industries and Mines Bank (IMB), and (5) the Pak Dairy.

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8. WESTBERG, supra note 7, at 10.
10. Id.
The original cause of action circulated among the Claims Tribunal and the U.S. judicial system for over a decade. All of the parties still await a final determination of liability. From 1959 through 1979, McKesson controlled the top management and the board of directors of Pak Dairy. On January 22, 1982, McKesson and the Overseas Private Investment Corporation (OPIC) filed a complaint against the present defendants alleging that Iran, acting through her co-defendant agencies and instrumentalities, illegally divested McKesson of its equity interest. The action was stayed while the parties, pursuant to the executive order, took their dispute to the Tribunal.

The Tribunal concluded that the interference with McKesson's rights had not amounted to an expropriation by January 19, 1981. However, the Tribunal ruled that Pak Dairy illegally withheld $900,000 in cash dividends declared in 1979 and 1980 and failed to deliver stock certificates representing dividends and further breached certain contractual obligations. Finding that the Government of Iran had controlled Pak Dairy, the Tribunal awarded damages plus interest against Iran.

In April 1988, McKesson revived the original lawsuit seeking further compensation for losses claimed beyond the Tribunal's cut-off date. McKesson was denied partial summary judgment against Iran on the issue of liability. Upon an interlocutory appeal, the D.C. Court of Appeals remanded on the issue of "whether the government of Iran exercised the necessary degree of control over the defendants to create a principal/agent relationship and thus permit [the] court to deem Iran responsible for their actions." After an extremely critical analysis of all the co-defendants' actions, the Court found "the necessary degree of control."

II. CASE ANALYSIS

A. The Appellate Court Ruling

From the beginning, Iran claimed that it was immune from liability under the Foreign Sovereign Immunities Act of 1976. Generally, a district court lacks subject matter jurisdiction in a civil action against a foreign state or an...
instrumentality or agency of the foreign state. However, certain exceptions to immunity do apply. These include: (1) the waiver of immunity, (2) property expropriated in violation of international law, (3) commercial activities occurring in the United States or causing a direct effect in this country, and (4) non-commercial torts occurring in the United States.

However, McKesson sought to hold Iran indirectly responsible for the actions of her co-defendants. Indirect liability is allowed under the FSIA assuming certain criteria are met. Yet, under the FSIA the acts of agencies or instrumentalities are accorded a presumption of independent status. The presumption of independent status can be overcome where "internationally recognized equitable principals" command liability so as to avoid injustice. This is a factual determination made by the court. The Court of Appeals held that the findings of the Tribunal were insufficient to determine whether the necessary principal/agent relationship had been found. The Appellate Court ruled that the factors in determining majority control and shareholding used by the Tribunal were relevant, although insufficient, under the FSIA presumption.

Furthermore, the Court of Appeals affirmed the ruling that Iran lacked sovereign immunity under the third exception to the FSIA. Under the third exception, a sovereign lacks immunity for actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere ... and that act causes a direct effect in the United States." In determining subject matter jurisdiction, the Court may only consider acts that are commercial in nature and not those acts based upon a sovereign activity. The actions alleged were not found to be governmental but sufficiently commercial in nature so as to withstand Iran's motion to dismiss.

The Court determined that the evidence proposed by McKesson was largely based upon conclusions of law concerning attribution from the Tribunal. This would not be considered controlling upon the Court because the Algiers Accords do not require the presumption of independence for agencies and instrumentalities.

25. Id. See also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (stating that as long as service has been properly made and subject matter jurisdiction exists, personal jurisdiction under the FSIA also exists). In the present case, the Court of Appeals found that Iran waived its objection of personal jurisdiction, because the claim had never been raised before. 905 F.2d at 453.
28. Id.
29. Id.
31. Id.
32. Id. at *21-22.
34. McKesson Appeal, 905 F.2d at 450.
35. Id.
ties. Although the Tribunal's findings of attribution were not controlling on the issue of whether there was a principal agent relationship, the Court stated that the relevant evidence on the two distinct issues "may be largely coextensive."  

B. McKesson's Contentions

McKesson claimed that their submitted evidence established three central points. First, anti-American policies were a central theme of the Iranian government. Second, Iran authorized and required her instrumentalities to act as agents of the government and Iran asserted sufficient control to ensure that the agents would enforce the government's anti-American policies. Third, the co-defendant agencies and instrumentalities exercised their authority as Iran's agents in the implementation of those anti-American policies at Pak Dairy by denying shareholder benefits to McKesson for reasons unrelated to the interests of Pak Dairy. Using the Tribunal findings and the evidence submitted by McKesson, the Court found a principal/agent relationship existed between Iran and the co-defendants.

1. Anti-American Policies

Regarding McKesson's first point, the Court had previously taken judicial notice of the anti-American attitude prevalent in Iran at the time in question. McKesson offered statements of anti-American rhetoric and acts of the government of Iran. This was evidenced by the Iranian Constitution of 1979, demonstrating that anti-American policies were implemented through the Government's control of Pak Dairy's board of directors. Iran argued that the actions on her part, the Iranian Constitution, and edicts were solely in the realm of sovereign activity and not relevant to the principal/agent question. The Court summarily dismissed this contention because the Appellate Court had already held that McKesson's cause of action could be maintained upon the

37. Id. at *25.
38. Id.
39. Id. at *26.
40. Id. at *26-27.
41. Id. at *27.
42. Id. at *28.
43. Id. The Iranian Constitution, adopted in 1979, states: (1) that the government "shall employ every possible means to achieve" the prevention of foreign influence (Article 3), (2) that the economy of the Republic shall be established to prevent foreign control of the national economy (Article 43), (3) that foreigners are prohibited from establishing corporations and institutions in certain fields including commerce (Article 81). Id. The court further quoted the Edict from the Revolutionary Prosecutor of August 9, 1980, which states: "that no payments for rent, business income and dividends from companies can be made to individuals who have left the country... [and] the transfer of stock or partnership shares in companies for such individuals" is not authorized without the approval of the Revolutionary Prosecutor. Id.
44. Id. at *29. See also Gibbons v. Republic of Ireland, 532 F. Supp. 668, 672 (D.D.C. 1982) ("for purposes of determining whether a sovereign should be held liable along with its instrumentalities it is far more relevant to determine whether the government officials acted in concert with employees of an instrumentality than whether they seek the same ultimate objective").
commercial activities exception.⁴⁵ Although the Appellate and District Court’s decisions did not address the issue, the failure to satisfy the commercial activities exception could have been the critical failing point for McKesson’s action. As set out below, the ad hoc satisfaction of the “commercial activities” exception will again salvage McKesson’s action.

2. Was There A Principle/Agent Relationship?

McKesson’s second contention was that Iran authorized and required her instrumentalities to act as her agent and to enforce Iran’s policy. The court analyzed each of the co-defendant’s roles and found a principal/agent relationship existed between Iran and the co-defendants.

The Foundation for the Oppressed (Foundation) was the first co-defendant the court found to have had a principal/agent relationship with Iran. The Tribunal had previously determined that the Foundation was an entity controlled by the Government of Iran for purposes of the Algiers Accords.⁴⁶ Iran argued that under the FSIA, the Foundation was not within the definition of agency or instrumentality because it was a financially independent, religious organization that was not run by government officials.⁴⁷ The Court disagreed, although it still had to determine whether the Foundation was an “organ” of Iran. This determination was also relevant to the question of whether a principal/agent relationship existed.⁴⁸ The creation of a principal/agent relationship has been defined in many different ways. For example, the Restatement (Second) of Agency, Section 1, Comment a (1958), defines the creation of the relationship as “a result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.” As set out below, the ad hoc rule handed down by the instant court is similar to the Restatement view.

The Court found certain pieces of evidence as controlling on this issue. The Foundation was established at the direction of the Ayatollah Imam Khomeini, with the intent of confiscating royal properties and redistributing them to the poor.⁴⁹ The Foundation had the power to direct governmental institutions,

⁴⁵ 905 F.2d at 450.
⁴⁶ McKesson, LEXIS at *30. The Claims Tribunal adopted earlier findings that the Foundation was an entity of Iran for the purposes of the Algiers Accords. See Foremost-Tehran, supra note 16, slip op. at 18 (citing Hyatt Int’l Corp. v. Iran, 9 Iran-United States Claims Trib. Rep. 72). Iran claimed that the Foundation, under the FSIA, did not fit within the definition of agency or instrumentality because it was an entity controlled by the Government of Iran for purposes of the Algiers Accords. See supra note 15, slip op. at 18 (citing Hyatt Int’l Corp. v. Iran, 9 Iran-United States Claims Trib. Rep. 72). Iran claimed that the Foundation, under the FSIA, did not fit within the definition of agency or instrumentality because it was an entity controlled by the Government of Iran for purposes of the Algiers Accords. See supra note 15, slip op. at 18 (citing Hyatt Int’l Corp. v. Iran, 9 Iran-United States Claims Trib. Rep. 72).
⁴⁸ 28 U.S.C. § 1603(b)(2). The District Court held that the Financial Organization falls within the FSIA (28 U.S.C. § 1603 (b)(1) and (b)(3)), but because the Financial Organization did not own shares of Pak Dairy it became a question of whether it was an “organ” of Iran under (b)(2) so that all three of the criteria of the FSIA were satisfied. The court found that Financial Organization was an “organ” of Iran and a principal/agent relationship existed.
⁴⁹ McKesson, LEXIS at *13.
including prosecutorial offices to carry out this intent. The Ayatollah appointed the Prime Minister of Iran as director, whose supervision over the Foundation served as the “supervision of the Iranian cabinet over the Foundation.” In addition, the Foundation issued a statement in the official Iranian newspaper that all companies in which the Foundation held rights were required to disclose their company financial statements and were prohibited from transferring any foreign shareholder payments without the consent of the Foundation. The Tribunal found that the Foundation held 9.5% of Pak Dairy’s shares. The Court found that the appointment of the Prime Minister as director, along with the official notice and other pertinent information, evidenced the fact that the Foundation was not only an “organ” of Iran, but was an agent as well.

The Financial Organization for the Expansion of Ownership of Industrial Units (Financial Organization) was the second co-defendant that the Court found to have a principal/agent relationship with Iran. Iran admitted that most of the directors of the Financial Organization were made up of government ministers, however, it was not an “agent” of Iran. The objective of the Financial Organization was to expand the ownership of industrial industries in Iran to the people. Iran supplied the capital for the organization and it was guided by Iranian government regulations related to government-owned companies.

50. Id. at *31-32.
51. Id. at *33 (quoting Hyatt Int’l Corp., 9 Iran-United States Claims Trib. Rep. 72 (Westlaw Int. Library Iran File, at 14-15)). Iran contended that the appointment of the Prime Minister was not an the official capacity, and that the appointment by the Ayatollah was based upon the personal confidences of Mr. Mousavi, not his position as Prime Minister. Iran supported this statement by the fact that Mr. Mousavi’s successor was not assigned the supremacy role over the Foundation. McKesson, LEXIS at *34. The District Court rejected this argument, noting that Iran did not state how they knew the Ayatollah’s reasoning for the appointment. Id.
52. The Notice was published in the Official Gazette, July 3, 1980. Id. at *35.
53. Id. at *34-35. Iran stated that the finding of the Foundation as an “organ” was in essence to “finding the Baptist Church an instrumentality of the U.S. if President Clinton served on the board.” Id. at *35-36. However, in contradicting their position, Iran argued at the motion hearing that the religious powers of the Ayatollah gave him power over the Foundation. Id. However the District Court disagreed with the holding of the Claims Tribunal in Hyatt, where it was determined under the Accords that the Ayatollah’s religious and secular powers were not separable. Thus the exercise of “religious” authority was an exercise of “government” authority. In discussion of the colorful analogy made by Iran concerning the Baptist Church, the court made two important distinctions. First, the “Baptist Church cannot discover and seize property with the help of prosecutorial and other agencies.” Id. Second, the “Baptist Church has no authority to direct all companies, whether nationalized or not, to comply with such a notice as” in the Official Gazette. Id.
54. Id. at *37.
55. Id.
56. Id. (citing the Financial Organization’s Articles of Association #4, 18, 20). The Financial Organization’s Articles of Association show they are connected with the Ministry of Economic Affairs and Finance, whose acting director serves on the General meeting. In Article 4 of the Articles, “the capital for the organization is provided by and paid out of the State General income.” Id. Any deficits in funding are paid out by Iran under Article 18. Possibly most indicative of the principal/agent relationship was under Article 20. The Financial Organization is “governed by Iranian Government regulations related to companies in cases where the Articles of Association do not apply.” Id. Due to this excess of evidence indicating the existence of a principal/agent relationship, Iran did not seem to vigorously defend the lack of such a relationship.
The Court discussed two letters that were mailed on government letterhead, written by the managing director of the Financial Organization. The Tribunal found that the Financial Organization, along with its member workers and families, owned approximately 20.4% of Pak Dairy's shares and two seats on the board of directors. The Court found that a principal/agent relationship had been established by the Articles of Association, the inferences raised by the letters, and the findings of control by the Tribunal. As evidenced throughout the opinion, the court was looking for any additional evidence, beyond the finding of the Claims Tribunal, that would tend to show some governmental control.

Iran conceded that the third co-defendant, the Industries and Mines Bank (IMB), clearly was an agency or instrumentality of Iran within the meaning of FSIA. The Legal Bill on the Administration of the Bank's Affairs was enacted following the nationalization of all banks. This provided for the governing authority of the IMB to be maintained within the High Council of the Iranian Government. The IMB incorporated the Legal Bill into its Articles of Association. Additionally, the general authority of the bank, and most supervisory roles were maintained by high government officials. Ultimately the IMB controlled 13.6% of Pak Dairy's shares and three seats on its board of directors. The Court found a principal/agent relationship.

Iran argued that the fourth co-defendant, the National Investment Company of Iran (NICI), was not an agency nor an instrumentality because it was a joint-stock corporation, with the majority owned by private citizens. The Tribunal found that NICI was a governmental agency under the Algiers Accords, because the majority of its board members were dominated by directors of government-
own companies.66 Again, the Court had to make a determination upon FSIA standards. McKesson contended that Article III of NICI’s Articles of Association established that NICI’s goal was to further the expansion of industrial ownership under governmental supervision.67 The Claims Tribunal had found that NICI held 8.3% of Pak Dairy’s stock.68 The Court found a principal/agent relationship existed.

The last of the co-defendants was Pak Dairy itself. The Tribunal found that in total the other co-defendants, i.e. government-controlled entities, controlled fifty-two percent of Pak Dairy’s shares and seven seats on its board of directors.69 Iran argued that the computation of these percentages was incorrect, using their previous arguments for the other co-defendants. The Court reaffirmed its previous discussion and concluded that Pak Dairy was therefore an agency or instrumentality under the FSIA.70 However, a further determination of whether Iran’s co-defendants were acting as agents of Iran in controlling Pak Dairy was required to determine whether there was a principal/agent relationship between Iran and Pak Dairy.71

3. Were the co-defendants acting as agents of Iran?

The Court had previously determined that on the face of McKesson’s complaint, the allegations would amount to the necessary degree of control to attribute the actions of the co-defendants to Iran.72 However, the issue was not the same as in the present case. On remand from the Court of Appeals, the District Court specifically described certain pieces of evidence that supported the finding of a principal/agent relationship among the co-defendants and the government of Iran. This evidence, in addition to the findings of “control” by the Tribunal, supported the finding of the required relationship. There were three primary actions on the part of the co-defendants that supported this finding: (1) the activities on the board of directors and at the shareholder’s meetings of Pak Dairy; (2) the discussions concerning the payment of dividends; and (3) the composition of the board of directors of Pak Dairy.

The Court found the activities on the board of directors and at the shareholders meetings of Pak Dairy highly persuasive. In October of 1979, two

66. *Id.*

67. *Id.* Under Article III, NICI is “structured to implement the government’s economic agenda by furthering the expansion of industrial ownership and thereby ‘distribute wealth and income between citizens of Iran more appropriately . . . and to reduce the risks of central ownership in one company.’” *Id.* at *43-44. Therefore Foremost contended NICI’s economic role, with government supervision and the fact that the government owned and controlled the board of directors, established NICI as an agent of Iran. *Id.* at *44. In their defense, Iran claimed that it did not control the Foundation or NICI. Without these companies, Iran did not own a majority of shares or seats in Pak Dairy. *Id.*

68. *Id.*

69. *Id.* The District Court found the Foundation and NICI were agencies/instrumentalities of Iran; therefore, it adopted the Claims Tribunal’s findings that Iran controlled 52% and held a majority Pak Dairy Board of Director seats. Accordingly, Pak Dairy was an agency/instrumentality of Iran.

70. *Id.* at *45.

71. See Gibbons, 532 F.Supp. at 672 and supra note 44.

representatives of the Financial Organization were elected to the board of directors, "beginning a period of overriding influence," of the Financial Organization over other board members and the management of the dairy.\textsuperscript{73} Further, the Financial Organization then called a general shareholder meeting to amend Pak Dairy's Articles of Association.\textsuperscript{74} At the following month's board meeting, the representatives wrote on the meeting's minutes that "all foreign contracts were to be reconsidered and any payments made to foreign corporations were illegal."\textsuperscript{75} Additionally, the representatives declared that the board retained full control over the managing director to determine and approve all financial activities of Pak Dairy.\textsuperscript{76} The following month at a special meeting of the board, the representatives restated to the managing director that no foreign payments were to be made until the matter was approved by the board.\textsuperscript{77} Although relevant to show that these individuals exerted a high degree of control over Pak Dairy, the Court did not truly examine the relationship between these individuals' actions and their "parent" entities.

Second, the court found the discussions over the payment of dividends revealed the government's control over Pak Dairy.\textsuperscript{78} At the February 1980 meeting, representatives of the Financial Organization reaffirmed the position to deny dividend payments, and stated that the Dairy was not a joint-stock corporation and that "the profit of the people and government should also be considered."\textsuperscript{79} The following month, the question of dividends and payment of profits was addressed.\textsuperscript{80} Again, representatives of the Financial Organization stated that due to the existing disputes between the governments of Iran and the United States, payments of profits to foreign shareholders was to be delayed.\textsuperscript{81} At the April 9, 1980 meeting over concerns that foreign shareholders would attempt to withdraw funds from Iranian accounts abroad if any profit shares were issued, a representative of the Financial Organization stated that the decision would remain undecided until the board could seek guidance "from their respective government heads to find a probable solution."\textsuperscript{82} As a result of the preceding dispute, the chairman of Pak Dairy's board resigned. He was concerned that no payments had been made since the revolution because foreign payments were under government control and any payment to foreign sharehold-

\begin{itemize}
\item \textsuperscript{73} McKesson, LEXIS at *47-48 (citing Foremost-Tehran, 10 Iran-United States Claims Trib. Rep. 228 (1986)).
\item \textsuperscript{74} McKesson, LEXIS at *48.
\item \textsuperscript{75} Id. at *48-49.
\item \textsuperscript{76} Id. at *49.
\item \textsuperscript{77} Id. at *49-50.
\item \textsuperscript{78} Id. at *50.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at *51.
\item \textsuperscript{81} Id. The representatives of Financial Organization suggested the minimum regular profits should be divided among the shareholders and the balance of profits should be placed in a reserve fund with no premium shares to be issued. Id. They reasoned this was necessary because of the presence of foreigners as shareholders. The board decided an 18% cash profit and 10% premium shares were rational because keeping profits undivided would not deprive stockholders of their rights. Id.
\item \textsuperscript{82} Id. at *52.
\end{itemize}
ers was against the governments’ policy. At subsequent meetings stock was issued; however, representatives of NICI declared that no payments were to be made to foreign shareholders because of the prohibition. Although McKesson requested their payments, they were refused and the managing director of the Dairy was reminded that he was not allowed to answer any request for foreign payments. Again, in order to satisfy the FSIA standard, the Court was searching for the additional evidence of government control beyond the findings of the Claims Tribunal. The delay of a decision to seek guidance from their respective governmental heads was exactly the type of evidence that persuaded the Court. However, one further category of acts finally clinched the deal.

The Court found the composition of the board of directors of Pak Dairy highly persuasive of the existence of a principal/agent relationship. At the October 1980 meeting, the shareholders voted to replace McKesson representatives with government representatives from the Foundation for the Oppressed, the IMB, and NICI. At this meeting, the Financial Organization’s representative stated that the government representatives would work without compensation so as to promote company freedom from foreign interests. This purpose, stated by the government representatives, gave the Court the final piece of additional evidence needed to find the “necessary degree of control.”

Although requested, McKesson never received any dividend payments, annual reports, statements, or information from Pak Dairy. The result of these actions was the unlawful ousting of McKesson from their investment in Pak Dairy. The Pak Dairy board of directors, which were controlled by the government of Iran, used its majority control to illegally divest McKesson from their control in Pak Dairy. The Pak Dairy board of directors created a climate so hostile to McKesson as foreigners, that McKesson realized they would no longer receive their rightful profits from their investment.

C. The Claim of Attribution

The Court discussed the claim of attribution for jurisdictional purposes and the doctrine of the corporate entity. An incorporated entity is not to be regarded as legally separate from its owners in all circumstances. When the entity is

83. Id. at *53.
84. Id. at *54.
85. The response to McKesson’s request stated that “due to decision and instruction of the board of directors, Pak Dairy would not pay any money for any reason to foreign shareholders.” Id. at *54, n.17.
86. Id. at *55.
87. Id.
88. McKesson Appeal, 905 F.2d at 438.
89. Id. at *58.
90. Id. See Bancec, 462 U.S. at 626-27 (whether a sovereign should be held accountable for the actions of the instrumentality is determined by reference to the principles of international law and U.S. federal common law). The House Report accompanying the FSIA also supports the presumption of separateness when viewed in light of the policy considerations. H.R. REP. NO. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 6604, 6628-29 [hereinafter HOUSE REPORT]. The Supreme Court in Bancec declined to adhere to the corporate form because doing so would have allowed the sovereign state to avoid liability on a counter-
so extensively controlled by its owner that a principal/agent relationship is created, then both parties may be held liable for the actions of the other. This is especially true when allowing the corporate form will promote fraud or injustice and would generally be against public policy. McKesson argued that to allow Iran to hide behind Pak Dairy’s corporate form would be unjust and that principles of international law supported the finding of a principal/agent relationship. Iran argued that the many cases decided under the FSIA had not found attribution.

At this point, the Court was reminded of the Bancerc decision that held there is “no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.” This “reminder” supports the Court’s rather arbitrary findings throughout the decision. The Court concluded, rather summarily, that the cases Iran proposed were factually distinct from the instant case and McKesson’s further evidence established the principal/agent relationship.

1. Evidence of the Principal/Agency Relationship

The Court next specifically outlined the evidence involving the Iranian government and co-defendants that established the principal/agency relationship. McKesson proposed that “the actions by Pak Dairy’s board and shareholders resulted in an expropriation culminating in either late 1981 or early 1982 and were taken in implementation of the declared policy of Iran to deny Americans participation in the business and economic life of Iran.” First, the board had extensive day-to-day involvement in the operations of Pak Dairy, including retention of authority on virtually all important financial matters. Second, there were many instances in which the Iranian government displayed an intent that the board members could act for the government. The Court was impressed not only by the delay of the shareholders meeting so that board members could “confer” with their respective government heads, but also with the letters written on government letterhead. The Court further relied on equitable concerns in that: (1) McKesson would unlikely have a remedy against the instrumentalities in the United States because of the probable inability of establishing personal jurisdiction; and (2) the unlikelihood of a remedy in the claim while it sought relief itself in the U.S. courts. McKesson, LEXIS at *59.

91. Id. at *58.
92. Bancerc, 462 U.S. at 630.
93. McKesson, LEXIS at *60.
94. McKesson, LEXIS at *60. Cases refused to decide attribution based solely on majority control of board of directors and majority ownership of stock. Id.
95. Id. at *65 (quoting Bancerc, 462 U.S. at 633).
96. McKesson, LEXIS at *66.
97. Id.
98. Id. See Kalamazoo Spice Extraction Co. v. Provisional Military, 616 F. Supp. 660, 666 (W.D. Mich. 1985)(by appointing the majority of the board of directors and requiring that all checks in excess of a certain amount had to be signed by one of the government directors, the government exercised direct control over the company). The board decided that Pak Dairy would not pay foreign investors, including McKesson which held a minority of shares and seats on the board. McKesson, LEXIS at *67.
99. Id.
100. Id.
Iranian legal system.\footnote{101} Although these acts are highly convincing of a principal/agent relationship, the Court was able to use rather arbitrary factual findings in order to establish the requisite “additional evidence.”

2. Commercial Activities and Direct Effects

The Court next addressed the commercial activity and direct effects issue. The Court of Appeals had found that the allegations by McKesson were sufficiently commercial in nature to withstand Iran’s motion to dismiss.\footnote{102} Further, the evidence presented sufficiently direct effects, which were “foreseeable, substantial and direct,” so as to confer subject matter jurisdiction.\footnote{103} Iran argued that the previous test had changed and had been specifically rejected.\footnote{104} The Court determined that the Court of Appeals decision to confer subject matter jurisdiction based on direct effects had not been overruled because the facts of \textit{Weltover} were distinct from the instant case.\footnote{105} The Court stated that the evidence fully supported the finding of direct effect in the United States.\footnote{106} There had been many contacts broken by the wrongful acts including flow of capital, management, data, and machinery between the U.S. and Iran.\footnote{107} As a direct and “immediate effect” of these wrongful acts by Pak Dairy, this flow

\texttt{\textbf{101. }Id. at *68.}\n\texttt{\textbf{102. }905 F.2d at 451.}\n\texttt{\textbf{103. }McKesson, LEXIS at *74. \textit{See McKesson Appeal}, 905 F.2d at 449-50. Under 28 U.S.C. \S\ 1605 there are general exceptions to the jurisdictional immunity of a foreign state:}\n\texttt{(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. \S\ 1605(a)(2) cl. 3.}\n\texttt{On Appeal, Iran cited Zedan v. Kingdom of Saudi Arabi, 849 F.2d 1511 (D.C. Cir. 1988) which established the direct-effects test. A “direct effect is one that is substantial and foreseeable.” \textit{Id.} at 1514.}\n\texttt{104. McKesson, LEXIS at *74. Iran proposed that Republic of Argentina v. Weltover rejected the “substantial and foreseeable” test in favor of the “immediate consequence” test. 112 S. Ct. 2160 (1992). The District Court stated that \textit{Weltover} did “not appear to have overruled the Court of Appeals’ conclusion in \textit{Foremost-McKesson} that the alleged effects of ‘freezing out American corporations in their ownership of Pak Dairy,’ were at least as substantial as effects alleged in other cases.” \textit{Id.} at *75 (citing \textit{McKesson Appeal}, 905 F.2d at 451).}\n\texttt{105. In \textit{Weltover}, 112 S.Ct. 2160 (1992), foreign plaintiffs sued for breach of contract. Argentina had issued bonds which required payment of interest in U.S. currency, with payment to be made in cities including some in the U.S. at the election of the creditor. In that case the court determined that under the FSIA “commercial” exception, the defendant’s actions were sufficiently commercial and direct in effect on the United States, therefore the District Court had jurisdiction over the claim. \textit{Id. See} International Housing Ltd. v. Rafidan Bank Iraq, 893 F.2d 8, 11 (2d Cir. 1989)(no direct effect on the U.S. because the use of American equipment and personnel in Iraq was incidental and there was no required payment in the U.S.); Martin v. Republic of South Africa, 836 F.2d 91, 95 (2d Cir. 1987)(no direct effect in the U.S. because the American plaintiff after being injured in South Africa, did not return to the U.S. for more than a year after the accident).}\n\texttt{106. McKesson, LEXIS at *76.}\n\texttt{107. \textit{Id.} at *77.}
The Court found that McKesson had met its burden of asserting facts sufficient for the Court to find that a principal/agent relationship existed between Iran and her co-defendants so as to confer subject matter jurisdiction upon the Court over Iran for the acts of her instrumentalities.

III. THE LAW TODAY

The FSIA, Foreign Sovereign Immunity Act, was enacted to codify U.S. policy of facilitating domestic corporations or individuals when suing a foreign government. Generally, foreign countries are considered immune from suit; however, certain exceptions apply which are enumerated by the FSIA.

There were four primary reasons for the enactment of the FSIA. First, Congress intended to enumerate when a sovereign could claim immunity from suit within the U.S. under the general auspices of sovereign immunity. Second, Congress was concerned with fostering foreign countries’ confidence in our judicial system, so sovereign immunity status is decided upon legal rules and not political considerations. Third, Congress was concerned with making a procedural rule whereby courts would be able to maintain in personam jurisdiction, rather than forcing plaintiffs to seize property of the foreign state held in the U.S. to ensure jurisdiction. Finally, Congress wished to establish a means whereby courts could enforce judgments against foreign defendant governments.

There are few exceptions provided to the general rule of sovereign immunity under the Act. These include waiver, the commercial activities exception, the expropriation exception, and the tort exception. In the present action, the commercial activities exception was used. Section 1605(a)(2) provides that immunity will not apply in a case “in which the action is based upon a commercial activity . . . outside the territory of the United States in connection with a commercial activity . . . outside the territory of the United States in connection with a commercial activity . . .”

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109. McKesson, LEXIS at *76.
111. Id. at 9.
112. Id. at 7.
113. Id.
114. Id. at 8.
115. Id. See also 28 U.S.C. § 1610(b) (1988).
117. Id. § 1605(a)(2).
causes a direct effect in the United States." The standard is if the government is engaging in activity a private party could engage in, the activity is considered commercial, not sovereign and immune. The law has recently changed regarding what constitutes a direct effect. Prior to Weltover, in order to have a direct effect in the U.S., an injury's effect had to have been "substantial and foreseeable." Today the previous test has been changed in favor of the "immediate consequence" test.

The most significant rule of this case, however, dealt with defining the presumption of independent status afforded to foreign governments in regard to their instrumentalities. Initially, the District Court had concluded that the "issues were the same, or at least very similar" to the ones presented at the Tribunal. The Court originally allowed the requisite principal/agency relationship to be shown by the Tribunal's findings of attribution based solely upon majority board control and share ownership. As discussed earlier, this was the primary reason for remand to "make further factual determinations in light of the more rigorous . . . standard required under the FSIA."

The more stringent FSIA standard requires that entities are afforded a presumption of independent status. This is overcome where the corporate entity is so extensively controlled by the government that a principal/agent relationship is created. The rationale for this rule displays some of the broad policy considerations surrounding the enactment of the FSIA. Congress feared that the failure to recognize a presumption of separateness "might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary" and possibly subject the U.S. government to foreign court jurisdiction more often. Although the FSIA is a more stringent standard than that used at the Tribunal, they both were trying to determine the same issue.

The essential difference between the two standards of the FSIA and the Tribunal deals with the burden of proof. Both decisions dealt primarily with trying to determine whether there was control by the government of Iran over these specific entities. Under the Algiers Accords, used by the Tribunal, the burden was upon the defendant to disprove government control. Under the stricter standard of the FSIA, the burden of proof is upon the plaintiff to establish governmental control because of the initial presumption of separate-

118. Id.
122. 905 F.2d at 445.
123. Id.
124. Id. at 446.
125. Bancerr, 462 U.S. at 633-34.
126. Id.
127. HOUSE REPORT, supra note 90, at 29-30.
128. Id.
ness.\textsuperscript{130} However, this seems to have a more equitable result under the FSIA. Attribution is found if the government is truly guiding the entity upon a specific course of activity, rather than looking solely at ownership controls.

There were specific areas of evidence that persuaded the Court that a principal/agent relationship had been satisfied so as to confer subject matter jurisdiction under the FSIA.\textsuperscript{131} First, the Court was persuaded by the arguments regarding the disfavorable Iranian government policies against foreigners. Second, many of the statements made by the board members concerning stock payments to foreigners requiring governmental approval persuaded the Court. Finally, the activities of the board of directors had a significant effect including: (1) the extensive day-to-day involvement in the operations of Pak Dairy; (2) the deference maintained by the board members to their respective government heads; and (3) the letters written on government letterhead by the Foundation representative.

The weakest point of the decision was the finding that the commercial activities exception to the FSIA had been satisfied. Although not applied, the change in the law from the “substantial and foreseeable effects” to the “immediate consequences” test provides a highly lenient standard to satisfy.\textsuperscript{132} This is true because any action will be based upon a claim that is arguably the result of any “immediate consequence” felt in the United States. Although the Appellate Court previously determined that the commercial activities exception had been satisfied, the District Court reaffirmed this position, because there had been the flow of capital, management, personnel, engineering equipment, and data. None of the decisions, however, discussed the fact that this “flow” was to Iran from the United States.\textsuperscript{133} Numerous decisions have held that a financial impact felt in this country alone is insufficient to satisfy the exception.\textsuperscript{134} Although these decisions were decided under the old standard, if now considered satisfied under the new test, the rule of law has clearly become too lenient.

In total, the law today has significantly changed because of the ten-year journey of the Iranian government, Foremost-McKesson, and the instrumentalities involved in the instant suit. Plaintiffs have a much higher burden in that they

\begin{itemize}
  \item \textsuperscript{130} See Letelier v. Chile, 748 F.2d 790, 795 (2d Cir. 1984).
  \item \textsuperscript{131} See generally supra notes 76-100.
  \item \textsuperscript{132} Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993), (Stevens, J., dissenting). Imposing that caution must be used in determining acts as “commercial activity,” for by doing so the exception could “swallow” the sovereign immunity defense Congress granted in the FSIA. \textit{Id.} at *68. Thus the broad reading of exceptions to FSIA could leave it powerless.
  \item \textsuperscript{134} \textit{Id.} See also Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988).
\end{itemize}
must show a principal/agent relationship between the foreign government and the alleged instrumentality. However, the standard for the commercial activity exception, under the FSIA, has become very lenient.

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