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Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica

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I. INTRODUCTION

On November 28, 1979, an Air New Zealand DC-10 aircraft carrying tourists bound for an expedition to Antarctica crashed into the side of Mount Erebus, the highest peak on the frozen continent. All aboard perished.[1] Four years later, the families of some of the New Zealanders killed in the accident brought suit against the United States Government[2]

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1. *See* N.Y. Times, Nov. 29, 1979, at 1, col. 1.

2. *See* Beattie v. United States, 592 F. Supp. 780 (D.D.C.), *aff'd*, 756 F.2d 91 (D.C.

under the Federal Tort Claims Act (FTCA).[3] They claimed that the negligence of the air traffic controllers at the United States scientific base at McMurdo Sound, Antarctica, was the proximate cause of the crash.[4]

This Article considers numerous aspects of this litigation and the theoretical issues it raises for federal practitioners and international lawyers. Part II offers a complete survey of the foreign country exception to federal tort claims jurisdiction.[5] Although the application of this exception hinges on the interpretation of the phrase "foreign country" and whether a claim actually arises in such a place, no consistent definition has ever been provided for those two words under the FTCA. This Article provides a taxonomy of cases in which the foreign country exception has been raised as a defense by the Government, systematizes the definitions that have been offered, and correlates these with the express and implicit policies underlying the exception. Part III answers the question whether Antarctica can or should be considered a foreign country. Such an analysis requires a careful assessment of certain aspects of the continent's international legal status, past American practice, and the analogy of criminal jurisdiction. It also requires the application of the various tests for a foreign country surveyed in Part II. Finally, Part IV explores the venue and choice of law problems arising from a federal tort claim originating in Antarctica.

The foreign country exception to federal tort claims operates as a significant check on persons suing the Government. Essential to this jurisdictional limit is a rational definition of foreign country, one which comports with both American practice and international law. The problems raised by torts occurring in Antarctica wonderfully illustrate the essential purposes of the foreign country exception as well as the practical aspects of litigating claims arising in unusual locales, with uncertain venues, and

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Cir. 1984).

3. Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1982)) [hereinafter FTCA].

4. *See Beattie*, 592 F. Supp. at 781. Claimants alleged these controllers "failed to advise the crew of the DC-10 of the hazardous meteorological conditions and the plane's descent into mountainous terrain." *Id.* at 781 n.1. *See also* N.Y. Times, Dec. 11, 1979, at 9A, col. 1 (navigational error cited as cause of crash). Plaintiffs also contended that the controllers were negligently trained in, and supervised from, Washington, D.C.

5. *See* 28 U.S.C. § 2680(k) (1982) ("The provisions of [the Act] shall not apply to . . . . [a]ny claim arising in a foreign county."). There are other exceptions, of course, to federal tort claims jurisdiction. These include the much-litigated "discretionary function" exception, 28 U.S.C. § 2680(a), claims for such torts as assault, battery, libel, slander, and contractual interference, *id.* § 2680(h), and claims arising from wartime activities, *id.* § 2680(j).

problematic choices of law. In concluding that Antarctica is not a foreign country for the purposes of the exception, this Article suggests that the only sensible definition of that troublesome phrase is one that emphasizes the presence or absence of another nation's tort law which effectively governs the claim.

II. THE FOREIGN COUNTRY EXCEPTION

A. *Historical Background of the FTCA*

The FTCA expressly provides that its jurisdiction shall not apply to "[a]ny claim arising in a foreign country."[6] Yet, despite twenty-eight years of legislative drafting,[7] the foreign country exception apparently escaped close scrutiny.[8] The only conclusions that can be drawn from the sparse legislative history arise because of language rejected before the final draft.

For example, the bill considered by the House Judiciary Committee in 1942 exempted all "claims arising in a foreign country in behalf of an alien."[9] This version would have "made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship."[10] The Attorney General objected to that language and had the phrase "in behalf of an alien" dropped.[11] The Supreme Court's only occasion to interpret the foreign country exception came in *United States v. Spelar*,[12] where the Court noted that the amended version of the exception "identified the coverage of the Act with the scope of United States sovereignty."[13] In support of this proposition, the Court quoted a statement by Assistant Attorney General Shea speak-

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6. FTCA, ch. 646, § 2680, 62 Stat. 984 (1948) (codified at 28 U.S.C. § 2680(k) (1982)). This same language was used in the FTCA's predecessor statute. *See* Act of Aug. 2, 1946, ch. 753, § 421, 60 Stat. 845 (codified at 28 U.S.C. § 943(k) (1946)).

7. *See* United States v. Spelar, 338 U.S. 217, 219-20 (1949).

8. The FTCA was the product of dissatisfaction with the old, cumbersome system of considering claims against the Government through a private bill procedure in Congress. *Spelar*, 338 U.S. at 220 n.6. Without an express waiver of the Government's immunity from suit, an action against the United States is impossible. *See* United States v. Orleans, 425 U.S. 807, 814 (1976); Dalehite v. United States, 346 U.S. 15, 30-31 (1953); *cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

9. H.R. REP. NO. 5373, 77th Cong., 2d Sess., at § 303(12) (1942).

10. *Spelar*, 338 U.S. at 220.

11. *See Hearings on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess., at 29, 35, 66 (1942) [hereinafter *1942 House Hearings*]. For a full description of the last phases of the FTCA's consideration, see *Spelar*, 338 U.S. at 220 n.9.

12. 338 U.S. 217 (1949) (Reed, J.).

13. *Id.* at 221.

ing in favor of the new draft. He stated:

> claims arising in a foreign country have been exempted . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.[14]

According to the Court, this statement revealed that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power."[15]

It seemed clear, then, that Congress intended to bar claims arising under foreign law. Unfortunately, Congress passed up an earlier opportunity to provide a geographic limit on actions. In 1940, language proposed before the Senate Judiciary Committee would have made the FTCA "applicable only to damages or injury occurring within the geographic limits of the United States, Alaska, Hawaii, Puerto Rico, and the Canal Zone."[16] In the same year, the House Judiciary Committee considered similar language that would have limited claims to those "arising in the United States or its territories."[17] Both of these proposals would have limited the scope of the FTCA to specific geographic areas. Because these proposals were rejected, it seems that Congress preferred simply to make an exception in the case of foreign countries, without any further elaboration or definition.[18]

The foreign country exception's legislative history does not provide enough insight to construct a sensible definition of the term. One Con-

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14. *Id. See 1942 House Hearings, supra* note 11, at 35 (testimony of Asst. Attorney General Shea).

15. *Spelar*, 338 U.S. at 221.

16. *See Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38, 65 (1940) [hereinafter *1940 Senate Hearings*].

17. *See Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. No. I of the House Judiciary Comm.*, 76th Cong., 3d Sess. 3 (1940) [hereinafter *1940 House Hearings*].

18. One later jurist would discount the significance of Congress' rejection of these specific geographic limitations on the FTCA's scope. *See* Beattie v. United States, 756 F.2d 91, 114-15 (D.C. Cir. 1984) (Scalia, J., dissenting). Judge Scalia believed that the language before the Senate Judiciary Committee in 1940, *see 1940 Senate Hearings, supra* note 16, had never been really introduced, and thus was poor evidence of a negative inference of Congressional intent. Nevertheless, it seems clear that the similar language considered by the House Judiciary Committee in that same year was squarely considered and debated. *See 1940 House Hearings, supra* note 17. Judge Scalia did not consider this other piece of legislative history in his dissent in *Beattie*.

gressional policy—ensuring that claims against the United States not be governed by foreign law—was plainly stated. However, that policy alone cannot draw the boundaries of what is a foreign country and what is not. Notwithstanding certain language in Assistant Attorney General Shea's statement that "it is wise to restrict the bill to claims arising in this country,"[19] the balance of Congress' consideration of the provision indicated no intention to limit claims to a specified geographic area. This legislative history is all the more peculiar since sovereignty, the concept Congress apparently invoked when it expressed its unwillingness to have claims adjudicated under foreign law,[20] is typically coexistent with a nation's territory.

Thus, two premises exist for the foreign country exception. One is the preservation of national sovereignty. The other is limiting exposure to another nation's tort laws when deciding a claim against the United States Government. There is a definite tension between these ideas: sovereignty implicates territory, while the desire to avoid jurisdiction over foreign torts raises choice of law considerations. This conflict will be explored below in the process of developing a useful definition of "foreign country."

B. *The Meaning of "Arising in"*

Another aspect of the foreign country exception must be analyzed before we can arrive at a suitable definition of that term. After all, one must first determine whether a claim even "arose in" another country before exploring the details of geography, political affiliations, and international law. The FTCA provides that a claim may be made against the Government "if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred."[21] Once again, the legislative history does not help clarify the meaning of this provision.[22] Nevertheless, in *Richards v. United States*,[23] the Supreme Court decided that the statute means what it says: the words "law of the place

19. *1942 House Hearings*, *supra* note 11, at 35.

20. *See supra* note 13 and accompanying text. Ensuring that claims against the Government be based on American law also permitted Congress to further regulate the substantive law to be used under the Constitution's supremacy clause, U.S. CONST. art. VI, cl. 2.

21. 28 U.S.C. § 1346(b) (1982).

22. *See* Richards v. United States, 369 U.S. 1, 8-10 (1962). In *Richards*, the Court explored Congress' intent in drafting this section. *Id.* at 8-10. The Court concluded that Congress indicated rather little concern over choice of law problems arising from federal tort claims. *Id.* at 8 n.17.

23. 369 U.S. 1 (1962).

where the act or omission occurred" mean where the acts of negligence take place, and not where the negligence has its operative effect.[24]

This interpretation dictates that a claim should be barred only if the negligent act takes place in a "foreign country."[25] Conversely, if the negligent act occurs in the United States—or any other locality not deemed a "foreign country"—the claim should be allowed. Under this reasoning, claims should be permitted under the FTCA when actual injury takes place in a foreign country as a result of a negligent act committed elsewhere. Such claims are referred to as "headquarters claims."[26] Air crashes that occur on foreign soil, but are the proximate result of Government negligence in the United States, have thus been allowed.[27] Headquarters claims have also arisen where a person was wrongfully detained in Germany because the United States transmitted false information through INTERPOL,[28] and for injuries to servicemen in Vietnam due to Agent Orange, since the decision to use it was made in Washington, D.C.[29] Headquarters claims have, however, been denied in a number of cases.[30] The concept underlying such claims also gives the Government an opportunity to invoke the exception. This occurs when the negligence happens in a foreign country but its operative effect is felt in the United States. Claims arising under these facts have been denied.[31]

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24. *Id.* at 10 (law to be applied was that of Oklahoma, where negligent Federal Aviation Administration activities occurred, and not Missouri, where the airplane crashed).

25. *See* Sami v. United States, 617 F.2d 755, 762, n.7 (D.C. Cir. 1979) ("What must be *in* a foreign country under the exemption is, we think, not a 'claim arising' but 'an act or omission of an employee of the government'." (original emphasis)).

26. *See* Eaglin v. United States, 794 F.2d 981, 982 (5th Cir. 1986).

27. *See, e.g.*, Leaf v. United States, 588 F.2d 733, 736 (9th Cir. 1978) (aircraft damaged in Mexico through fault of Drug Enforcement Agency employee); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 737-38 (C.D. Cal. 1975) (Government alleged to have failed to approve, certify, and inspect airplane).

28. *See Sami*, 617 F.2d at 761-63 (claim allowed in part; denied in part).

29. *See In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (foreign country exception no bar).

30. *See, e.g., Eaglin*, 794 F.2d at 982-84 (insufficient nexus between purported lack of notice in United States of dangerous walkway conditions and plaintiff's slip and fall on base in West Germany); Bryson v. United States, 463 F. Supp. 908, 911 (E.D. Pa. 1978) (negligence which contributed to murder of army private by intoxicated barracksmate held to have occurred only in Germany).

31. *See, e.g.*, Manemann v. United States, 381 F.2d 704 (10th Cir. 1967) (negligent diagnosis occurred in Taiwan; onset of disease was in United States); Knudsen v. United States, 500 F. Supp. 90, 93 (S.D.N.Y. 1980) (aircraft inspection made in United Kingdom; crash occurred in Puerto Rico).

The very concept of headquarters claims has not gone unchallenged. Writing in the case of *Beattie v. United States*,[32] Judge (now Justice) Scalia opined that headquarters claims could undermine the whole foreign country exception.[33] This has not proved to be true,[34] although Judge Scalia's concerns may be relevant to the potential abuse of the tactic in domestic litigation.[35]

Judge Scalia's fundamental concern was that claims be given sensible ambits.[36] He proposed, therefore, to refine the rule articulated in *Richards* that a court must apply the law of the place where the negligence occurred.[37] Judge Scalia suggested that "the place of the relevant 'act or omission' is the place where that operative noncompliance occurs—regardless of whether any specific 'blame' can be attributed to any particular federal employee at that point."[38] This test emphasizes "where the proximate breach of duty producing that injury takes place"[39] and not where the injury takes place, the rule rejected in *Richards*. Judge Scalia's test would, in effect, add an explicit proximate cause evaluation before determining whether a claim "arose in" a foreign country.[40]

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32. 756 F.2d 91 (D.C. Cir. 1984). This suit concerned the victims of the Air New Zealand crash in Antarctica. *See supra* notes 1-4 and accompanying text.

33. *See* 756 F.2d at 119 (Scalia, J., dissenting).

34. *See supra* note 30 and accompanying text. Plainly, courts require a substantial showing of a nexus between negligence in the United States and an injury abroad. *See, e.g., Eaglin*, 794 F.2d at 983-84.

35. *See Beattie*, 756 F.2d at 106-30 (Scalia, J., dissenting). Judge Scalia noted that the use of headquarters claims could obtain the benefit of a different substantive law (thus serving as a forum-shopping device) or avoid the application of other exceptions to the FTCA. *Id.* at 119 n.12 (citing Shearer v. United States, 723 F.2d 1102 (3d Cir. 1983), *rev'd*, 473 U.S. 52 (1985); Ducey v. United States, 713 F.2d 504, 508 n.2 (9th Cir. 1983) (Nevada law was chosen over California law in wrongful death action arising from flash flood)). This tactic does not always work. *See* Mundt v. United States, 611 F.2d 1257, 1259 (9th Cir. 1980) (Arizona tort law applied under FTCA for failure to release prisoner from Arizona jail, presumably stemming, in part, from decisions occurring outside Arizona); Gard v. United States, 594 F.2d 1230, 1232-33 (9th Cir.) (Nevada tort law applied to failure to place fences to mark Nevada mine, a decision made by Bureau of Mines officials in Washington, D.C.), *cert. denied*, 444 U.S. 866 (1979).

36. *See Beattie*, 756 F.2d at 118-20 (Scalia, J., dissenting) (arguing that plaintiffs had confused "causes of action" with "claims," and thus impermissibly multiplied their chances to escape the foreign country exception and fix on a favorable forum). *Cf. id.* at 131-33 (Wald, J., concurring) (criticizing Judge Scalia's approach).

37. *See Beattie*, 756 F.2d at 120-23 (Scalia, J., dissenting).

38. *Id.* at 122 (Scalia, J., dissenting).

39. *Id.* n.14 (Scalia, J., dissenting).

40. Judge Scalia provided this example to illustrate his approach:

Such a proximate cause analysis has, of course, been applied to dismiss headquarters claims that presented too tenuous a nexus between negligence in the United States and injury abroad.[41] However, even if theoretically justifiable,[42] Judge Scalia's test simply provides a conclusory way to deny those claims. Nor does it convincingly resolve the implicit ambiguities of the "arising in" language.

These questions are further illustrated by those cases in which courts considered anomalous domestic locations. When, for example, two states exercise concurrent jurisdiction over a particular area, the law of the state in which the negligence occurred will be applied.[43] This may not necessarily be the law of the state that has jurisdiction over the location where the act or omission took place.[44]

This distinction is crucial, for without it claims dependent on federal, and not state, law could be contrived for negligence occurring in federal enclaves.[45] If the distinction were not recognized, injuries occurring on the high seas, which are within no nation's (much less any state's) jurisdiction, could not be actionable at all. The FTCA presently excludes

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> [I]f it is claimed that an accident was caused by a government car making a left-hand turn without signalling, it would not matter whether the government-employee driver was negligent in failing to activate the turn signal, or whether he had been negligently trained to turn without signalling at some other location, or whether he in fact activated the signal which did not work because of negligent servicing by government employees at yet a third location; the "act or omission" occurred where the alleged breach of standard that injured the plaintiff took place.

Id. at 122 (Scalia, J., dissenting) (footnote omitted).

41. *See* Eaglin v. United States, 794 F.2d 981, 982-84 (5th Cir. 1986); *see also supra* note 30.

42. Judge Scalia cited confidently the Supreme Court's decisions in Richards v. United States, 369 U.S. 1, 8-10 (1962), and The Admiral Peoples, 295 U.S. 649, 651 (1935), in support of his conclusion. *See Beattie*, 756 F.2d at 122-23 (Scalia, J., dissenting). *But see id.* at 135-38 (Wald, J., concurring) (questioning whether these cases offer the support Judge Scalia suggested). Obviously, the issues of proximate cause and choice of law principles affect every FTCA case, and not just those involving the foreign country exception. Headquarters claims arise in domestic litigation primarily as a forum-shopping device. *See supra* note 35. When injuries occur abroad, it is the only means to circumvent the foreign country exception.

43. *See* Brock v. United States, 601 F.2d 976, 978 (9th Cir. 1979).

44. *Id.* at 978-80. (in accident occurring over the Columbia River on Bonneville Dam, where both Oregon and Washington exercised jurisdiction, Washington law applied because negligence could be traced to Washington side of river).

45. *See* Castro v. United States, 775 F.2d 399, 405 n.6 (1st Cir. 1985) (rejecting the notion that federal law applied in Puerto Rico because it is not a state; therefore, federal statutory and constitutional law violations are not actionable under FTCA).

from jurisdiction[46] claims for which a remedy is provided by the Suits in Admiralty Act.[47] Claims under the Death on the High Seas Act[48] are likewise cognizable under the Suits in Admiralty Act, but not the FTCA.[49] Furthermore, the locality test for cases arising in admiralty does not consider where the wrongful act or omission occurred, but rather the place of injury.[50] Consequently, injuries occurring on the high seas are actionable under the Suits in Admiralty Act, while those occurring in "foreign countries" are barred by the FTCA.

The best test for a claim that "arises in" a foreign country is the one adopted by the Supreme Court in *Richards*,[51] that is, the situs of the alleged Government negligence. To engraft onto this basic rule a rigorous determination of proximate cause, requiring claimants to establish a conclusive nexus between negligence in the United States and injury abroad, would often speak to the merits of a case, rather than providing a workable jurisdictional check. Instead, a minimum showing of proximate cause should suffice to exclude claims that truly arose in a foreign country. Only this flexible approach can effectively accommodate diffi-

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46. *See* 28 U.S.C. § 2680(d) (1982).

47. *See* Suits in Admiralty Act, ch. 95, 41 Stat. 525 (1920) (as amended and codified at 46 U.S.C. §§ 741-52 (1982)); Public Vessels Act, ch. 428, 43 Stat. 1112 (1925) (codified at 46 U.S.C. §§ 781-90 (1982)).

48. Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920) (codified at 46 U.S.C. §§ 761-67 (1982)) [hereinafter DOHSA].

49. *See* Roberts v. United States, 498 F.2d 520, 526 (9th Cir. 1974) (claim brought by representatives of those killed in air crash just a few thousand feet short of runway off Okinawa had claim under DOHSA through Suits in Admiralty Act, but not under FTCA), *cert. denied*, 419 U.S. 1070 (1979); Blumenthal v. United States, 306 F.2d 16 (3d Cir. 1962) (allowing DOHSA claim, but not addressing FTCA exception, for action occurring on high seas between Korea and Japan). Prior to 1960, DOHSA claims could be brought under the FTCA so long as a remedy was not provided under the Suits in Admiralty Act or the Public Vessels Act. *See* Moran v. United States, 102 F. Supp. 275, 277 (D.Conn. 1951) (Government sued under FTCA when aerial bomb exploded while being hauled up in net of vessel, killing seamen). The language of the 1960 amendment to the Suits in Admiralty Act, which allowed suit "[i]n cases where if such vessel were privately owned or operated, . . . or if a private person or property were involved, a proceeding in admiralty could be maintained . . .", 46 U.S.C. § 742, has been held to encompass actions under DOHSA. *See Roberts*, 498 F.2d at 525.

50. *Roberts*, 498 F.2d at 524 n.3. *Compare* The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865) ("Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.") *with* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 673 (1982) and Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) (qualifying the rule in The Plymouth by requiring nexus between injury and maritime location before admiralty jurisdiction is permitted). *See also* F. MARAIST, ADMIRALTY IN A NUTSHELL 32-44 (1983).

51. Richards v. United States, 369 U.S. 1, 10 (1962).

cult cases in which a number of discrete acts, occurring in different jurisdictions, contribute to, and cause, a tort. Plainly, the answer to the riddle of applying the foreign country exception is not to broaden the ambit of claims "arising in," but rather, to conclusively define the meaning of "foreign country."

C. *The Meaning of "Foreign Country"*

1. Case Law Interpretations

A taxonomy of cases in which the Government has raised the foreign country exception reveals surprising judicial consistency in treating similar kinds of places abroad. These places include areas unquestionably within the territory of another sovereignty, American embassies, areas under lease to the United States by a foreign country, military bases, and lands conquered during wartime. In each case, claimants sought to argue that these locations were not foreign countries for purposes of the FTCA.

Many of these cases undoubtedly presented few difficulties for the courts. It did not require much insight to rule that torts occurring in such places as South America,[52] Egypt,[53] and Korea[54] were barred by the foreign country exception. The same applied to claims occurring in foreign airspace.[55]

United States embassies abroad, however, have been treated in a less summary fashion. Under modern international law, embassies are not

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52. *See, e.g.*, Grunnet v. United States, 730 F.2d 573 (9th Cir. 1984) (Guyana); Maffei v. Nieves-Reta, 412 F. Supp. 43, 44 n.4 (S.D. Cal.), *aff'd*, 549 F.2d 807 (9th Cir. 1977) (in claim brought on behalf of person killed by alien given border-crossing pass into United States, the alleged negligence of granting pass occurred in Mexico); United States v. Anasae Int'l Corp., 197 F. Supp. 926 (S.D.N.Y. 1961) (in FTCA counterclaim, injurious investigations of defendant's coffee production were conducted in Brazil, and thus not actionable); Armiger v. United States, 339 F.2d 625 (1964) (plane crash in South America). Of these cases, only *Grunnet* presented a colorable headquarters claim. *See Grunnett*, 730 F.2d at 573 (court rejected argument that failure to warn daughter of danger posed by the People's Temple sect in Guyana occurred in United States).

53. *See* Mounteer v. Marine Transp. Lines, Inc., 463 F. Supp. 715 (S.D.N.Y. 1979).

54. *See* Orion Shipping & Trading Co. v. United States, 247 F.2d 755 (9th Cir. 1957) (injury occurring in Korean port). *See also* Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970) (claim for reward of treasure trove found in Vietnam).

55. *See* Pignataro v. United States, 172 F. Supp. 151, 152 (E.D.N.Y. 1959) (claim for negligent operation of an unpressurized military transport at a high altitude).

deemed to have any extraterritorial character.[56] Instead, the law of the host state applies.[57] As a result, courts considering the problem have taken solace in the language of the Supreme Court's decision in *United States v. Spelar*, which emphasized the policy of avoiding the application of foreign tort law[58] and ruled that the foreign country exception precludes claims arising from embassies overseas.[59]

By the same token, just because the United States leases (or otherwise acquires the use of) territory in another country does not make such an area anything other than a foreign country for purposes of the exception. This was, in fact, the specific situation presented in *Spelar*.[60] The tort in that case occurred at Harmon Field, Newfoundland, an area under a ninety-nine year lease by Great Britain to the United States.[61] In *Spelar*, the Court followed an earlier decision which held that the United States

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56. The absolute diplomatic immunities of extraterritoriality and *franchise du quartier* were pervasive in earlier times. *See* E. SATOW, GUIDE TO DIPLOMATIC PRACTICE 109 (5th ed. 1979). Today, it has been renounced. *See* Judgment of May 3, 1935, Trib. Rome, Italy, 60 Foro Italiano I 1725, 1726-27, 8 Ann. Dig. 235, 235-36 (in determining that Italian law governed succession to an estate of a Cardinal who lived in a Vatican-owned palace situated outside Vatican City, the court restricted the application of extraterritoriality); Judgment of Nov. 8, 1934, Reichsgericht, W. Ger., 69 Entscheidungen des Reichsgericht in Strafsachen 54, 55-56, 7 Ann. Dig. 385, 385-86 (in a shooting inside Afghan embassy in Berlin, the court held that the crime was committed on German national territory).

57. *See* Fatemi v. United States, 192 A.2d 525, 527-28 (D.C. 1963) (upholding conviction under local law of demonstrators who occupied Iranian embassy, and noting that a foreign embassy is not considered part of the sending state's territory). *See also* E. SATOW, *supra* note 56, at 107 ("But it is now everywhere accepted that [extraterritoriality] does not mean that the diplomat is not legally present in the receiving state or that the embassy is deemed to be foreign territory. Marriages, or crimes, occurring on diplomatic mission premises, are regarded in law as taking place in the territory of the receiving state."). The same is obviously true for torts.

58. 338 U.S. 217 (1949).

59. *See, e.g.*, Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964) ("No authority has been cited indicating that it is the duty of the federal courts to create rules governing liability for tortious acts and omissions on the premises of American embassies, and consulates abroad, and obviously our embassy at Bangkok has no tort law of its own.") (citation omitted), *cert. denied*, 379 U.S. 867 (1964); Gerritson v. Vance, 488 F. Supp. 267, 268 (D. Mass. 1980) (embassy in Zambia).

60. 338 U.S. 217 (1949).

61. *Id.* at 218. The lease was effectuated by executive agreement. *See* Agreement and Exchange of Letters Respecting Leased Naval and Air Bases, Mar. 27, 1941, U.K-U.S. art. I, para. 1, 55 Stat. 1560, 1572, 1576, 1590, E.A.S. No. 235 ("The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control. . . .").

had only limited control over areas under the lease.[62] Under principles of international law,[63] the lessee could not exercise any jurisdiction beyond that granted by the lessor or inconsistent with the purpose of the lease.[64] The Court concluded that applying American tort law in such leaseholds would be such an arrogation of authority.[65] Moreover, if American tort law could not apply, a foreign tort law must. Claims arising on American military bases abroad have thus been rejected.[66]

Although all of these situations were easily resolved by equating the extent of American sovereignty with the reach of American law, other cases eluded this simple legal geometry. The most troublesome incidents involved torts occurring in areas occupied by American military forces in the last phases of the Second World War and thereafter until the legal status of such territories was adjusted by treaty or declaration. Where the United States was acting as a liberator, instead of a belligerent occupier,[67] there was no question that sovereignty would not be transferred,

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62. 338 U.S. at 218 (citing Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (considering the application of the Fair Labor Standards Act to American contractors engaged in construction of a military base at Bermuda, transferred in the same lease)).

63. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 115-16 (3d ed. 1979) ("[T]here is a presumption that the grantor retains residual sovereignty."); 1 L. OPPENHEIM, INTERNATIONAL LAW 412-14 (H. Lauterpacht 6th ed. 1947).

64. Such leases need to be distinguished from situations in which a nation, by means of a treaty of extraterritoriality, grants to another nation the right to legislate for, and adjudicate disputes among, the second nation's citizens in the host state. *See* 2 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 593 (1906). Such was the situation for Americans living under consular jurisdiction in China between 1844 and 1943. *See* Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451 (1988) (complete survey of that regime). Such agreements did not transfer sovereignty, but they did allow another state to apply its laws to its citizens in the host state. In such a case, it would seem that tort laws would also be "imported."

65. *Spelar*, 338 U.S. at 219 (citing *Vermilya-Brown*, 335 U.S. at 380). The Court in *Spelar* emphasized that sovereignty in the base still rested with Great Britain. *Id.* For more discussion on the circumstances surrounding the "destroyers-for-bases" agreement with Britain, see *Vermilya-Brown*, 335 U.S. at 392-96 (Jackson, J., dissenting).

66. *See* Eaglin v. United States, 794 F.2d 981 (5th Cir. 1986) (base in Germany); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978) (military base in Germany); Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978) (Naval Air facility in Italy); Pedersen v. United States, 191 F. Supp. 95 (D. Guam 1961) (base in Philippines). These cases also feature medical malpractice claims arising from actions by United States military service doctors acting abroad. *See* Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983) (Germany); Manemann v. United States, 381 F.2d 704 (10th Cir. 1967) (Taiwan); Bell v. United States, 31 F.R.D. 32, 34-35 (D. Kan. 1962) (Japan); Rafftery v. United States, 150 F. Supp. 618 (E.D. La. 1957) (Germany).

67. Belligerent occupation occurs when "[t]erritory . . . is actually placed under the authority of the hostile army." Convention Respecting the Laws and Customs of War on

that local law continued in force, and that such areas would remain "foreign countries."[68]

When, however, the United States occupied the Pacific Islands that later became part of a United Nations Trusteeship,[69] sovereignty became divorced from jurisdiction, a phenomenon which subverts traditional analysis in FTCA cases.[70] One court held that the United States could make no laws as a sovereign of these islands because the United Nations retained residual sovereignty.[71] Still, it was obvious that the United States had, in fact, established a system of courts and had enacted, through codes, orders, and Congressional legislation, a tort law for these areas.[72] Nevertheless, the court in *Callas v. United States*[73] noted that it would be "difficult to ascertain and apply the local law in regions not under the sovereignty of the United States—especially in regions where the local law had not crystalized through established legislative or judicial definition or where its content was subject to change by administrative authority."[74]

This decision captured the methodology of earlier courts confronted with claims arising on islands under United States military occupation, such as Okinawa and Saipan.[75] In the early years of occupation, courts

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Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, 2306, T.S. No. 539, 1 Bevans 631, 651 [hereinafter Convention on Laws of War]. This status is distinct from the complete subjugation ("*debellatio*") of a territory which extinguishes the original sovereignty. *See* Rutledge v. Fogg, 43 Tenn. (3 Cold.) 554, 558 (1866) (status of defeated Confederacy). *See also* D. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914 (1949); Colby, *Occupation Under the Laws of War* (pts. 1 & 2), 25 COLUM. L. REV. 904 (1925), 26 COLUM. L. REV. 146 (1926).

68. *See* Straneri v. United States, 77 F. Supp. 240, 241 (E.D. Pa. 1948) (motorcycle accident in Belgium, an allied nation).

69. Trusteeship Agreement for Territory of Pacific Islands, Apr. 2, 1947, United Nations-United States, approved by Joint Resolution of Congress, July 18, 1947, ch. 271, 61 Stat. 397.

70. *See supra* notes 43-50 and accompanying text.

71. *See* Callas v. United States, 253 F.2d 838, 840 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) (holding that tort occurring on the Island of Kwajalein was not actionable). *See also id.* at 841-42 (Hincks, J., concurring) (quoting Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 269, 271 (1948)).

72. *See Callas*, 253 F.2d at 843 (Lumbard, J., dissenting) (quoting an Interior Department statement that the law of the Trust Territory also included " 'the common law of England and all statutes of Parliament in and thereof in force and effect on July 3, 1776, as interpreted by American courts' ").

73. *Id.* at 838.

74. *Id.* at 840.

75. These islands were taken in the last campaign against Japan in 1945. In the 1951 Treaty of Peace with Japan, Japan granted to the United States the right to "exer-

ruled[76] that these areas were not under the sovereignty of the United States and, therefore, were foreign countries.[77] But the test of sovereignty was not in the least helpful when the United States assumed powers of administration by the treaty with Japan.[78] A later court was forced to conclude that "the traditional test of sovereignty, when applied to the status of Okinawa, admits of no conclusive answer."[79]

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cise all and any powers of administration, legislation and jurisdiction over" the islands. Treaty of Peace with Japan, Sept. 8, 1951, art. 3, 3 U.S.T. 3169, 3173, T.I.A.S. No. 2490, 2494, 136 U.N.T.S. 45, 50. In 1971 they were returned to Japan. *See* Agreement Concerning the Ryukyu and Daito Islands, June 17, 1971, Japan-United States, 23 U.S.T. 446, T.I.A.S. No. 7314.

76. *See* Brunell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948).

77. *Id.* at 70. *Brunell* arose before the conclusion of the Treaty of Peace with Japan. The court, therefore, relied on State Department declarations that the legal status of Saipan had not been resolved. *Id.* The court also noted that "[t]here is, . . . a fundamental distinction . . . between military occupation, which by its nature is but temporary, and permanent acquisition." *Id.* This proposition has substantial support in international law, *see* H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 366-67 (R. Dana ed. 1866) (reprint 1964); E. DE VATTEL, THE LAW OF NATIONS 291-95, 307-12 (C. Fenwick transl. 1758 ed.) (reprint 1964), and in American jurisprudence. *See* Downes v. Bidwell, 182 U.S. 244, 346 (1901) (Gray, J., concurring) ("So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory. . . .") (legal status of Puerto Rico); De Lima v. Bidwell, 182 U.S. 1, 194 (1901) (same); Fleming v. Page, 50 U.S. (9 How.) 602, 615 (1850) (Taney, C.J.) ("While [territory] was occupied by our troops, they were in an enemy's country, and not in their own[.]") (legal status of goods imported from Tampico, Mexico, occupied during Mexican War); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.) ("The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.") (status of Florida).

78. *See supra* note 75.

79. Cobb v. United States, 191 F.2d 604, 608 (9th Cir. 1951), *cert. denied*, 342 U.S 913 (1952). The court in *Cobb* was wrestling with an outmoded concept of sovereignty. *Id.* at 608 ("So long as the ultimate disposition of that island remains uncertain, it offers a persuasive illustration of the observation that 'the very concept of "sovereignty" is in a state of more or less solution these days.' ") (quoting United States v. Spelar, 338 U.S. 217, 224 (1949) (Frankfurter, J., concurring)). This was because the court relied on the decision in *De Lima*, 182 U.S. at 180, which summarized the previous jurisprudence of Chief Justice Marshall and Justice Story in these terms: " 'A foreign country was . . . one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.' " *Cobb*, 191 F.2d at 607 (quoting *DeLima*, 182 U.S. at 180). Sovereignty, under these terms, was absolute and nondelegable. The court in *Cobb* thus found that the United States may have exercised *de facto* sovereignty over Okinawa, but it did not possess *de jure* sovereignty. *Id.* at 608.

The question then turned to whether American tort law was in force. The same court that found the test of sovereignty inconclusive later erroneously relied on the restrictions imposed by international law on belligerent occupiers[80] and held that American law could not apply.[81] This reliance was misplaced because the United States had selectively imposed its own laws and regulations in occupied territory, not only for the Pacific Islands, but also for Japan and Germany.[82] Later courts were obliged, therefore, to retreat to the lower ground of arguing that the United States did not possess sovereignty over these islands.[83]

The handling of claims arising in areas under military occupation evinced the great consistency courts desired in applying the foreign country exception to a variety of circumstances. There was, however, little to recommend in their contradictory, imprecise, and sometimes absurd definitions of "foreign country." One thing was certain: The true meaning of foreign country was neither "obvious"[84] nor merely a matter of "com-

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80. *See* Convention on Laws of War, *supra* note 67, which provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *Id.* art. 43, 36 Stat. at 2306, 1 Bevans at 651. The last clause would seem to preclude the imposition of new laws in the territory during occupation. For additional discussion on this provision, see Stein, *Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre*, 46 MICH. L. REV. 341 (1948); Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393 (1945).

81. *Cobb*, 191 F.2d at 609-11.

82. *See id.* at 611 (Pope, J., concurring) (discussing promulgation of regulations on Okinawa concerning traffic and motor vehicles). Indeed, it seems that the entire court in *Cobb* later came to believe that it would be an error to rely on article 43 for the proposition that the United States could not legally impose its own law (and that, therefore, foreign law had to apply). *Id.* As a matter of fact, the United States had decided that elimination of existing laws was necessary for the fulfillment of its duties as an Allied power. *See* McCauley, *American Courts in Germany: 600,000 Cases Later*, 40 A.B.A. J. 1041, 1041-42 (1954) (noting American goal of de-Nazifying Germany and restoring democracy).

83. *See* Burna v. United States, 240 F.2d 720 (4th Cir. 1957). In *Burna*, the Fourth Circuit stated that the Treaty of Peace with Japan, *supra* note 75, "cannot be considered as anything more than a transitional arrangement, and for our purpose it is not a conclusive test that under the Treaty attributes of sovereignty can be exercised for the time being by the United States." *Id.* at 722. *See also* Pedersen v. United States, 191 F. Supp. 95, 100 (D. Guam 1961) (citing the language in *Cobb* for a two-part test of sovereignty: (1) the " 'exclusive power to control and govern,' " and (2) the intention to retain territory permanently). Arguably, the United States administration over Okinawa failed the second prong of the test.

84. *See* Burnet v. Chicago Portrait Co., 285 U.S. 1, 5-6 (1932); Straneri v. United

mon sense."[85]

2. A Typology of Competing Theories

The problem of defining the term "foreign country" begins with the divergent policy goals, both stated and unstated, underlying the exception. As noted above,[86] the legislative history suggests two rationales: (1) preserving American sovereignty by limiting claims to those arising within the territory of this country (the "sovereignty" concern); and (2) precluding claims founded in foreign tort law (the "foreign law" concern). Courts have also discussed other, relatively minor factors, including the absence of United States courts abroad, that, in turn, raise venue and *forum non conveniens* problems.[87] The key tension, however, is between the choice of law and sovereignty rationales for the exception.

The underlying dissonance between these premises for defining foreign country becomes readily apparent once one realizes that each has mandatory and permissive articulations. The mandatory form of the sovereignty concern holds that before a place will be deemed a foreign country it must be shown that the United States is *not* sovereign. The permissive construction requires that another nation be sovereign. Likewise, the mandatory form of the foreign law concern mandates proof that United States tort law does not apply to a situs before that place is deemed a "foreign country." The permissive construction allows proof that another nation's tort law applies.

Were this not enough, the complications increase again when one recognizes that the actual theories that define the meaning of foreign coun-

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States, 77 F. Supp. 240, 241 (E.D. Pa. 1948) ("The term 'foreign country' is not a word of art, and its meaning is to be ascertained with reference to the particular act in which it is used."); Hichino Uyeno v. Acheson, 96 F. Supp. 510, 515 (W.D. Wash. 1951) (Yankwich, J.) ("[I]t is obvious that the words 'foreign state' are not words of art. In using them, Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on international law may have formulated. They used the word in the sense of 'otherness'. When the Congress speaks of 'foreign state', it means a country which is not the United States or its possession or colony. . . ."). *But see* United States v. Spelar, 338 U.S. 217, 219 (1949) ("We know of no more accurate phrase in common English usage than 'foreign country'. . . .") (citing De Lima v. Bidwell, 182 U.S. 1, 180 (1901)).

85. *See Cobb*, 191 F.2d at 612 (Pope, J., concurring).

86. *See supra* notes 19, 20 and accompanying text.

87. *See Burna*, 240 F.2d at 722; Hulen, *Suits on Tort Claims Against the United States*, 7 F.R.D. 689, 695 (1948) (acknowledging the difficulty of obtaining evidence from abroad). *But see* Sami v. United States, 617 F.2d 755, 763 (D.C. Cir. 1979) (speculating that concern over obtaining evidence from abroad was not a factor in Congressional consideration).

try incorporate elements of *both* the sovereignty and foreign law concerns. In other words, to satisfy a definition of foreign country it is often required that conditions prevailing in the subject locality fulfill either the mandatory or permissive forms of both concerns. This matrix is shown below:

		SOVEREIGNTY AXIS "Foreign Country" means place where—	
		U.S. IS NOT SOVEREIGN (mandatory)	ANOTHER NATION IS SOVEREIGN (permissive)
FOREIGN LAW AXIS	(mandatory) U.S. LAW DOESN'T APPLY	venue theory literalist theory	statutory theory
	ANOTHER NATION'S TORT LAW APPLIES (permissive)	sovereignty theory	foreign law theory choice of law theory

As can be seen, certain descriptors have been inserted in the appropriate cells to characterize the different theories that have been offered for the definition of "foreign country." More than one theory can exist in a box because of some essential difference. Each theory will be discussed in turn, with a review of the case law where it is espoused, and tested in reference to certain ambiguous jurisdictions.[88]

The "literalist" theory holds that a foreign country is every area *not* a component part or political subdivision of the United States. Under this

88. These ambiguous jurisdictions are listed on the table below with an indication of the prevailing sovereign and tort law. For more information, see references to notes in text.

Jurisdiction	Sovereign	Tort Law	Notes
Occupied West Berlin	Germany	U.S. & Germany	80, 82
Okinawa pre-1971	Japan	U.S. & Japan	75
Consular China	China	U.S.	64
Pacific Trust Territories	U.N.	U.S.	69

Discussion of the application of the theories to the legal status of Antarctica will be deferred until Part III, *infra*.

test, a claim will be allowed if it arises from places where the United States is sovereign and where American tort law applies. Judicial expressions of this theory have been fairly consistent.[89] The theory also comports with "the 'canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . .' "[90] Moreover, this theory links the sovereignty and foreign law concerns into a tight, restrictive test. Indeed, all of our hypothetical jurisdictions fail[91] because in none of them is the United States both the sovereign *and* sole source of tort law.

The "venue" theory is related to this literalist notion of sovereignty and law choice and focuses on whether the act or omission complained of arose within a federal judicial district. The FTCA establishes its own venue requirements. An action may be brought either in the judicial district where the plaintiff resides or where the claim arose.[92] This operates as a bar particularly affecting potential foreign claimants. If one is not resident in the United States, the only other option is to bring an action in the federal court for the district where the alleged negligence took place. Some have suggested,[93] therefore, that foreign country might be defined simply as any place outside of a federal judicial district. While this approach is not problem-free,[94] it produces the same effect as the

89. *See* Straneri v. United States, 77 F. Supp. 240, 241 (E.D. Pa. 1948) (places "within the boundaries of the United States or its territories and possessions") (Belgium); Brunell v. United States, 77 F. Supp. 68, 72 (S.D.N.Y. 1948) ("areas which were actually a component part or political subdivision of [this nation]") (Saipan); Bell v. United States, 31 F.R.D. 32, 35 (D. Kan. 1962) (those places "within the boundaries of the United States and those territories and possessions referred to in Title 48 of the United States Code Annotated") (Japan).

90. United States v. Spelar, 338 U.S. 217, 222 (1949) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). *See also* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) ("Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.").

91. *See supra* note 88. *See also supra* note 89 for actual cases.

92. 28 U.S.C. § 1402(b) (1982).

93. In Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984), for example, Judge Scalia asserted that "the venue provision for . . . regions [outside the United States] makes no sense, since the 'only . . . judicial district' in which suit has been allowed will *usually not exist—i.e*, will exist only if the plaintiff happens to reside in the United States." *Id.* at 110-11 (Scalia, J., dissenting) (original emphasis).

94. Applying this definition produces very strange results. A number of jurisdictions that have not been under the sovereignty of the United States have still had a federal court present. These include the United States Court for China and the United States

literalist plan.

The "statutory" theory for the definition of a foreign country finds its support in the numerous Congressional attempts to define the phrase before and after passage of the FTCA.[95] These enactments settled on the permissive expression of sovereignty and required only that a foreign country be a politically organized entity, not a component part or political subdivision of the United States. Congress adopted this formulation in the later legislative twin of the FTCA, the Foreign Sovereign Immunities Act (FSIA).[96] "Foreign state" was defined in the FSIA as a negative.[97] If this alternative statutory language were applied to our ambiguous jurisdictions,[98] all but the Pacific Trust Territories would be deemed foreign countries.[99]

Court for Berlin.

The China Court was created by a 1906 Act of Congress. Act of June 30, 1906, ch. 3934, 34 Stat. 814. For more on the work and jurisprudence of this tribunal, see Bederman, *supra* note 64, at 460-64. The United States Court for Berlin was established by a decree of the American occupying forces in West Berlin in 1951. High Commissioner Law No. 46, Apr. 28, 1955, Allied Kommandatura Gazette 1056. This court has jurisdiction over crimes committed by civilians in the American sector of West Berlin. The Court has sat only once, in the *cause celebre* of an East German hijacking a flight to freedom in West Berlin. *See* United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). *See also* Bederman, *supra* note 64, at 475-80.

Neither of these tribunals was established pursuant to article III of the Constitution; in fact, the Berlin Court's competence was limited to criminal matters. Nevertheless, they both operated as fora for the vindication of rights. Accepting Berlin and China as encompassed within federal judicial districts would permit a finding that they are (or were) not "foreign countries" for the purpose of the exception.

95. *See, e.g.*, Tariff Act of 1930, ch. 497, § 336, 46 Stat. 701, 702 (codified as amended at 19 U.S.C. § 1336(h)(3) (1982)) ("The term 'foreign country' means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions)."); 19 U.S.C. § 1338(i) (same); 12 U.S.C. § 3101(8) (for purposes of foreign bank participation " 'foreign country' means any country other than the United States. . . ."); 18 U.S.C. § 1953(d)(2) (interstate transportation of wagering paraphernalia); 18 U.S.C. § 1307(c)(2) (state-conducted lotteries).

96. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1602-11 (1982)). The FSIA codified restrictive notions of sovereign immunity and granted jurisdiction over foreign states in specified circumstances, including some actions in tort. *See* 28 U.S.C. § 1605(a)(5) (for language that tracks the FTCA).

97. 28 U.S.C. §§ 1603 (a), (c) (1982) (a "foreign state" is every place outside of the "United States," including "all territory and waters, continental or insular, subject to the jurisdiction of the United States").

98. *See supra* note 88.

99. Indeed, the Pacific Trusts have been found not to constitute a foreign state for the purposes of the FSIA. *See* Sablan Constr. Co. v. Trust Territory of the Pac. Islands,

The venue, literalist, and statutory theories share one thing in common: They manage to mix the foreign law and sovereignty concerns that drive this whole analysis. Conversely, the remaining theories emphasize either sovereignty or the presence of foreign law. The "sovereignty" theory, for example, holds that a place is a foreign country if the United States is not sovereign. As discussed above in relation to areas occupied by the United States after World War II,[100] this theory floundered for lack of a workable meaning for "sovereignty." Only one court directly addressed this problem,[101] and its response was equivocal. By defining sovereignty as those places where the United States has the " 'exclusive power to control and govern' . . . coupled with the intention to retain it *permanently*,"[102] the court adopted a mandatory form of the sovereignty concern, a formulation that plainly does not sufficiently address cases in which sovereignty is either shared (other than exclusive) or temporally limited (other than permanent).

In contrast, the application of the permissive and mandatory forms creates no such difficulties under the "foreign law" theory. This is because the inquiry of whether a foreign tort law is in force in a particular area is susceptible to a positive answer, one governed by choice of law principles rather than the vagaries of public international law notions of sovereignty. For example, the question whether American embassies abroad were to be deemed "foreign countries" was addressed by merely ascertaining whether American tort law was in force on those sites. The answer was unambiguously "no."[103] The same analysis was also employed with respect to leased bases abroad.[104] This total emphasis on the presence or absence of foreign tort law was also seen in cases from jurisdictions in which the United States clearly was not sovereign.[105] This

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526 F. Supp. 135 (D.N. Mar. I. App. Div. 1981). It is also likely that with the entry into force of the Covenant of Association, Pub. L. No. 94-241, 90 Stat. 263 (1976), 48 U.S.C. § 1681 (1982 & Supp. III 1985), the Northern Mariana Islands are now no longer considered a foreign country for purposes of the FTCA. *Sablan*, 526 F. Supp. at 138 n.8; *contra* Brunell v. United States, 77 F. Supp. 68, 72 (S.D.N.Y. 1948).

100. *See supra* notes 67-85 and accompanying text.

101. *See* Pedersen v. United States, 191 F. Supp. 95 (D. Guam 1961).

102. *Id.* at 100 (quoting Cobb v. United States, 191 F.2d 604, 608 (9th Cir. 1951) (original emphasis)).

103. *See supra* notes 56-59 and accompanying text.

104. *See supra* notes 60-66 and accompanying text.

105. *See, e.g.*, Manemann v. United States, 381 F.2d 704, 705 (10th Cir. 1967) ("Appellant's claim is thus dependent upon the law of Taiwan, a foreign country. . . ."); Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970). Admittedly, when courts use language that seems to invoke the foreign law theory, it is often in response to claimant's arguments that the claim actually arose in the United States and should,

test was more than a surrogate for sovereignty, useful only when that definition yielded no conclusive results.

The "foreign law" theory occasionally produced some strange outcomes. This was certainly true in those cases which held that the United States had yet to impose its tort law over those Pacific islands captured from the Japanese after the Second World War.[106] That result can be explained, however, as a misappreciation of the legal regimes in force on the islands, coupled with a misunderstanding of the law of belligerent occupation.[107]

A fair application of the foreign law theory produces a rather broad definition of "foreign country." When tested with our ambiguous jurisdictions,[108] all could be considered non-foreign areas. Americans living under consular jurisdiction in China in the early decades of this century[109] would be governed by American tort law, as administered by the United States Court for China,[110] even though they resided in an area under the sovereignty of China. In other extraterritorial jurisdictions, such as the American occupation of West Berlin today,[111] the problem is complicated by the arguable presence of both the host nation's and the occupier's laws. The analysis then shifts to a precise determination of whether the actual cause of action alleged sounds in foreign or American law.[112]

The final theory to be considered compels a conscious choice between two sets of laws competing in a single jurisdiction. This permissive form of the foreign law concern is best illustrated by regions, such as Antarctica, where no tort law exists. The problem can also be studied with reference to situations in which a tort law exists, but is somehow inadequate. This raises the "old notion of personal sovereignty,"[113] the allegiance of a subject to a sovereign which permits the extraterritorial ap-

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therefore, be considered a headquarters claim. *See supra* notes 25-35 and accompanying text.

106. *See, e.g.*, Cobb v. United States, 191 F.2d 604, 609-11 (9th Cir. 1951), *cert. denied*, 342 U.S. 913-14 (1952). *See also supra* notes 80-83 and accompanying text.

107. *See supra* notes 80, 81 and accompanying text.

108. *See supra* note 88.

109. *See supra* note 64.

110. *See supra* note 94.

111. *Id.*

112. In West Berlin, for example, traffic regulations are provided by the local authorities. *See* Bederman, *supra* note 64, at 478 n.140 (citing I. HENDRY & M. WOOD, THE LEGAL STATUS OF BERLIN 66 n.37 (1987)).

113. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (Holmes, J.).

plication of law abroad.[114] It should be noted, however, that this rule cannot be used to apply American tort law to injuries sustained abroad by a foreigner.[115]

The "choice of law" theory also recognized that the FTCA offers an important directive that claims against the Government should not be governed by foreign law.[116] But there will be occasions when it is not fair, appropriate, or logical to apply a foreign law to a claim, even where it arose within the sovereignty of another nation. The choice of law theory can, and has,[117] catered to these concerns. When there is no reason to apply a foreign law, it follows that the claim should not be barred by the foreign country exception. The choice of law theory thus calls on courts to make a policy decision.[118] This decision would weigh such factors as

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114. *See id.* at 355-56 ("No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law. . . .") (citing The Hamilton, 207 U.S. 398, 403 (1907); British South Africa Co. v. Companhia de Mocambique, [1893] App. Cas. 602 (Herschell, L.C.); Hart v. Gumpach, 4 L.R.-P.C. 439, 463, 464 (1873)). *See also* Chaplin v. Boys, [1971] App. Cas. 356, 396, 401 (Pearson, L.J.) (If one Englishmen wrongfully injures another in a primitive or unsettled territory where there is no law of torts, English law could be applied.); CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 519-37 (P. North & J. Fawcett 11th ed. 1987).

115. *See* Beattie v. United States, 756 F.2d 91, 113 n.7 (D.C. Cir. 1984) (Scalia, J., dissenting).

116. Other jurisdictional statutes and prudential doctrines accomplish much the same choice of law purpose. *See, e.g.*, Kirgis, *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58 (1988); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967) (explaining the use of that judicially-created doctrine as a choice of law mechanism).

117. *See In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984). In this phase of the *Agent Orange* litigation, the court considered which law to apply to the claims of American servicemen injured through exposure to the toxic defoliant Agent Orange while in Vietnam. The court dismissed the idea that the laws of Vietnam and Cambodia should apply:

> [T]he jurisdiction where most of the use of the herbicides took place, South Vietnam, no longer exists and Cambodia appears to be an independent state in name only now taken over by Vietnam. North Vietnam, the jurisdiction that has replaced South Vietnam and Cambodia, was at war with the United States and it was in the prosecution of the war that the exposure to Agent Orange took place. It would be ludicrous to allow North Vietnam (or France or the Soviet Union, whose laws undoubtedly have a strong influence on Vietnamese jurisprudence) to determine the law of this case.

Id. at 707.

118. *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984) (the next phase of the case) ("It is unclear at this point if the decisions relating to the misuse [of Agent Orange] took place in the United States or Vietnam . . . .

the desirability of applying the foreign law, the extent to which the claims arose in the United States, and the political ramifications of failing to apply the foreign law and enforcing the exception.[119] This theory not only offers the most open-ended approach for defining foreign country; it also produces the broadest results.[120]

This section has presented six distinct ways to define the phrase foreign country in the FTCA. Each has certain advantages, whether it be simplicity of formulation (as with the "venue" theory), ease of application (the "literalist" theory), or fidelity to past practice (the "statutory" theory). Some plainly produce better results, while others cannot be consistently applied. The taxonomy of cases sketched above, along with this typology of theories, shows how federal courts have reached consistent outcomes, while never really defining "foreign country." Considering

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There is no reason to attribute those mistakes to Vietnam rather than to the United States and no policy reason to apply the 'foreign claim' exception.") This clearly demonstrates how the "arising in" language of the foreign country exception also implicates choice of law issues. *See supra* note 42. The court in *Agent Orange* was obviously reluctant to attribute the wrongful acts to Vietnam. Thus, it effectively sanctioned a headquarters claim. 580 F. Supp. at 1255. *See also Beattie*, 756 F.2d at 98 (commenting on the approach taken in *Agent Orange*).

119. *Cf. Beattie*, 756 F.2d at 114 (Scalia, J., dissenting) (suggesting that since decisions concerning the foreign country exception implicate sensitive foreign policy issues, they should be left to the executive branch of government).

120. This can be seen by a chart which gives the results of applying each of the theories discussed above to each of the ambiguous jurisdictions, *supra* note 88.

Theory	Berlin	Okinawa	China	Trust Terr.
Literalist	FC	FC	FC	FC
Venue	NFC(1)	FC	NFC(1)	FC
Statutory	FC	FC	FC	NFC(2)
Sovereignty	FC	FC	FC	FC(3)
Foreign Law	FC	FC	NFC	NFC
Choice of Law	NFC(4)	NFC(4)	NFC(5)	NFC

Where FC means "foreign country" and NFC means "not a foreign country." Notes:

(1) *See supra* note 94.

(2) *See supra* note 99 and accompanying text.

(3) The sovereignty test, *see supra* notes 100-02 and accomanying text, was the mandatory form. A permissive form is, of course, also possible. That would allow a finding of a foreign country in those jurisdictions in which another nation exercises sovereignty. Under such a test, the Pacific Trust Territories, which were under trusteeship to an international organization, *see supra* note 69, would not be deemed a foreign country.

(4) In cases of areas under United States occupation, the question becomes one of whether the United States has insulated itself from claims by virtue of reserving to itself the power to define the relevant tort law. *See supra* notes 82, 112.

(5) *See supra* note 64.

whether Antarctica is a foreign country impels one to deliver the *coup de grace* to this doctrinal Hydra. The next section considers the question by reviewing the international legal status of the "last continent" and applying the theories discussed above.

III. Is Antarctica a "Foreign Country?"

A. *International Legal Status*

Before deciding whether Antarctica is a foreign country for purposes of the FTCA, one must determine if it is owned by anyone. Seven nations presently espouse claims to pie-shaped portions of the continent.[121] Although these claims have been expressed in terms of a sector theory,[122] they are actually premised on such divergent notions as patrimony and *uti possidetis*,[123] contiguity and appurtenance to a hinterland,[124] and

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121. *See* Hayton, *The Antarctic Settlement of 1959*, 54 Am. J. Int'l L. 349 (1960) (describing the claims of Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway). *See also* Joyner & Lipperman, *Conflicting Jurisdictions in the Southern Ocean: The Case of an Antarctic Minerals Regime*, 27 Va. J. Int'l L. 1, 8 (1986) (for a map of these nations' claims on the continent along with putative assertions of control over the Southern Ocean). Approximately twenty percent of the continent remains unclaimed. That area is reputed to be the American sector, although the United States has declined to make any stake on it. *See id.* at 35 n.118; Hayton, *The "American" Antarctic*, 50 Am. J. Int'l L. 583 (1956); *infra* note 130.

122. The sector principle was first applied in the Arctic, where it was used to establish claims to sea and ice separated from the land mass of the claiming state but within an established interval of longitude. "Whilst the 'sector principle' does not give title which would not arise otherwise, if the necessary state activity occurs, it represents a reasonable application of the principles of effective occupation as they are now understood. . . ." I. Brownlie, *supra* note 63, at 154-55 (citing Legal Status of Eastern Greenland Case (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Judgment of Apr. 5)). Among the states bordering the "Arctic Mediterranean," only Canada and the Soviet Union have adopted the sector principle. *Id.* at 155. Denmark, Norway, and the United States have refrained from exercising such claims. *Id.* For more on the sector theory, see Hyde, *Acquisition of Sovereignty Over Polar Areas*, 19 Iowa L. Rev. 286, 288-91 (1934), and cases cited in I. Brownlie, *supra* note 63, at 154 n.4. On the application of the sector theory to the Antarctic, see Bernhardt, *Sovereignty in Antarctica*, 5 Cal. W. Int'l L. J. 297, 332-38 (1975) (arguing against its use); Auburn, *The White Desert*, 19 Int'l & Comp. L.Q. 229 (1970); Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 Brit. Y.B. Int'l L. 311, 337-41 (1948).

123. Chile and Argentina subscribe to the theory of patrimony, which is their expression of the *uti possidetis* principle in international law. That principle holds that when Chile and Argentina ceased being Spanish colonies, they succeeded to Spanish rights of sovereignty as granted by the Papal Bull, *Inter Caetera*, May 14, 1493, Papacy-Spain-Portugal (Pope Alexander VI), which divided the New World between Spain and Portugal. *See* I. Brownlie, *supra* note 63, at 137-38 (for a complete descrip-

discovery.[125]

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tion of the doctrine). The concept has been applied only as a general principle involving claims by succession in frontier disputes in other parts of the world. *See* Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 565-66 (Judgment of Dec. 22); Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (Judgment of June 15); Case Concerning Sovereignty over Certain Frontier Land (Belg. v. Neth.), 1959 I.C.J. 209, 240, 255 (Judgment of June 20) (dissenting opinions of Judges Armand-Ugon and Moreno Quintana); *but see* Guatemala-Honduras Boundary Arbitration, 2 R. Int'l Arb. Awards 1307, 1322 (1933) (illustrating the weakness of the doctrine owing to the ill-defined nature of the old colonial administrative boundaries).

If applied to Antarctica, the theory would hold that no land in the New World is *terra nullius* and the applicable areas of Antarctica (those located west of the meridian which ran 370 leagues west of Cape Verde, according to the Papal Bull) belong to the Latin American nations, by virtue of succession from Spain. Other claimants have held the theory in low repute. *See* I. BROWNLIE, *supra* note 63, at 150-51 (disputing the characterization of the Bull as a "grant"); Bernhardt, *supra* note 122, at 345-47; Waldock, *supra* note 122, at 321-22, 325-26.

124. The doctrine of contiguity has been applied to cases in which coastal states sought to exercise dominion over islands and the continental shelf outside their territorial waters. *But see* I. BROWNLIE, *supra* note 63, at 154 (contiguity "is little more than a technique in the application of the normal principles of effective occupation") and 154 n.3 (citing cases in which contiguity was questioned); Note, *Sovereignty in Antarctica: The Anglo-Argentine Dispute*, 5 SYRACUSE J. INT'L L. & COM. 119, 127 (1977) (discussing Argentine claim over Falklands/Malvinas Islands). The use of this doctrine in advancing claims over the Antarctica mainland has also been criticized. *See* Waldock, *supra* note 122, at 342-43; von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 467-71 (1935); Note, *Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces*, 87 YALE L.J. 804, 815-16 (1978).

The concept of claims for the hinterland reflects the opposite tendency of contiguity. Under this theory, a state is entitled to proclaim sovereignty over interior areas of a land mass, based on the settlement of coastal areas. Although the Great Powers, in the 1885 Act of Berlin, required actual authority to be exercised over the interior areas of the African continent, the theory continued to be applied. *See* 1885 Opinion of the Law Officers of the Crown, in 1 A. MCNAIR, INTERNATIONAL LAW OPINIONS 292 (1956) ("[T]he general principle is, that if a nation has made a settlement it has a right to assume sovereignty over all the adjacent vacant territory, which is necessary to the integrity and security of the Settlement."). *See also* British Guiana Boundary Arbitration (U.K. v. Venez.), 11 R. Int'l Arb. Awards 21 (1904); I. BROWNLIE, *supra* note 63, at 153; Bernhardt, *supra* note 122, at 342-45. For a related basis of sovereignty known as "regions of attraction," earlier espoused by the Soviets, see Bernhardt, *supra* note 122, at 347-48.

125. Australia, Britain, France, and Norway directly or tacitly base their claims to Antarctica on discovery. P. JESSUP & H. TAUBENFELD, CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY 140 (1959). It is now well-established that discovery alone is insufficient for sovereignty. A territory must also be effectively occupied, which denotes some additional attempt to exert sovereignty over an area. *See* Clipperton Island

Whatever the origin of claims to land territory on the Antarctic continent, they have all been suspended by the terms of the Antarctic Treaty concluded in 1959.[126] Article 4 of the Treaty states that no claims may be enforced, expanded, or compromised while the Treaty is in force.[127]

Award (Fr. v. Mex.), 2 R. Int'l Arb. Awards 1105 (1931) (effective occupation such as is reasonable under all the circumstances in view of the extent of the territory claimed, its nature, and the uses to which it is adapted and employed); I. BROWNLIE, *supra* note 63, at 151-52 (noting that in the *Clipperton* case, courts agreed that even though French annexation was symbolic, it was sufficient to lay claim to the island).

The primary caveat to this rule is that discoveries made at a time when that alone sufficed would be allowed as evidence of sovereignty. *See* Island of Palmas Arbitration (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 846 (1928) (Huber, Arb.). This doctrine of "intertemporal law" recognizes that the rules of territorial acquisition can change over time. *See* I. BROWNLIE, *supra* note 63, at 141-47 (discussing effective occupation from this perspective). Since Antarctica was discovered only in the 18th century, and the first landfall made on the continent in the 1820s, it seems doubtful whether discovery alone would qualify as a basis for a claim to the continent. *See* Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231, 233-34 (1966) (also noting that the first wintering-over on Antarctic shores occurred in 1899); *see also* Van Dyke & Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, 12 OCEAN DEV. & INT'L L. 265 (1983) (for a practical view on the effects of discovery today).

126. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The treaty was ratified in 1961 by Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. These states were the original Antarctic consultative powers. *Id.* art 9, para. 1. Other nations have subsequently been admitted to this group; they include Brazil, the People's Republic of China, India, Poland, Uruguay, and West Germany. U.S. Dep't of State, *Treaties in Force: A List of Treaties and other International Agreements of the United States in Force on January 1, 1987*, at 217 (1987). Other countries are signatories to the Treaty but are not consultative powers. They include Bulgaria, Cuba, Czechoslovakia, Denmark, East Germany, Finland, Hungary, Italy, the Netherlands, Papua New Guinea, Peru, Romania, South Korea, Spain, and Sweden. *Id.*

127. The Treaty is in force for thirty years. Antarctic Treaty, *supra* note 126, art. 12, para. 2. The full text of article 4 provides:

1. Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sover-

In addition, as long as the Treaty is in effect, no nation party to that instrument[128] may validly purport to exercise sovereignty over any portion of Antarctica.[129] It has been the practice of the United States to recognize this rule.[130] The courts of this country are, likewise, obliged to respect this executive determination of what claims to territorial sovereignty are or are not to be recognized.[131]

It would appear, then, that sovereignty has been held in suspense in

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eignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Id. art. 4.

128. Obviously, non-parties to the Antarctic Treaty may attempt to assert their own claims. This might prove difficult, however, because the Antarctic Treaty, *supra* note 126, provides that "[e]ach of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." *Id.* art. X. *See also* I. BROWNLIE, *supra* note 63, at 266 (suggesting that non-parties might also be bound to observe article 4).

129. *But see* F. AUBURN, ANTARCTIC LAW AND POLITICS 1 (1982) [hereinafter F. AUBURN, ANTARCTIC LAW] (Antarctica remains "an entire continent of disputed territory"). Some authorities have likewise disputed the premise that the Treaty actually suspends claims. *See The Antarctic Treaty: Hearings before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 39, 61-62 (1960) (testimony of State Department official that claims asserted before the effective date of the Treaty, or not then asserted but based upon pre-Treaty activities, were unaffected, as was the right of all countries to implement past-asserted claims by exercise of sovereignty); Comment, *Quick, Before it Melts: Toward a Resolution of the Jurisdictional Morass in Antarctica*, 10 CORNELL INT'L L.J. 173, 185-86 n.57 (1976). For the legal consequences of the termination of the Antarctic Treaty, see Bernhardt, *supra* note 122, at 310-16.

130. The United States currently has no claims staked on the continent. *See supra* note 121. It does, however, reserve the right to claim sovereignty based upon its activities in the region prior to the adoption of the Treaty. Conversely, the United States declines to recognize the validity of other territorial claims that could be asserted by other nations based on similar activities. *See Law of the Sea Negotiations: Hearing before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Commm. on Foreign Relations*, 97th Cong., 1st Sess. 24-25 (1981) (statement of Assistant Secretary of State Elliot A. Richardson); Lissitzyn, *The American Position on Outer Space and Antarctica*, 53 AM. J. INT'L L. 126, 128 (1959). Interestingly, the Soviet Union shares the same position. *See* Boczek, *The Soviet Union and the Antarctic Regime*, 78 AM. J. INT'L L. 834, 841 (1984).

131. *See* United States v. Pink, 315 U.S. 203, 229-30 (1942) (validity of Litvinov Assignment for claims against the Soviet Government before recognition); Guaranty Trust Co. v. United States, 304 U.S. 126, 138 (1938); Kennett v. Chambers, 55 U.S. (14 How.) 38, 50-51 (1852) (status of Texas). Territorial claims are also subject to judicial notice. *See* FED. R. EVID. 201; Martin v. C.I.R., 50 T.C. 59, 61 n.2 (1968).

Antarctica.[132] That observation does not, however, decide the question whether the continent is even a proper subject for acquisition. If Antarctica is not amenable to a claim of sovereignty, if it is to be assimilated to other "common spaces" such as the high seas[133] or outer space[134] as the "common heritage of mankind,"[135] then it will forever be *terra nullius* (the property of no nation),[136] or alternatively, *res communis* (the property of every nation).[137]

If it is held as a matter of international law that no territorial claims to Antarctica can be currently enforced under the Antarctic Treaty,[138] we need not consider whether "Antarctica is not a foreign country [because] it is not a country at all."[139] This contention seems to depend on a

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132. *But see* Cobb v. United States, 191 F.2d 604, 607 (9th Cir. 1951) ("Sovereignty is never held in suspense") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936) (referring to the immediate succession of the American colonies to the former British sovereignty)).

133. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 89, 137, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter 1982 Law of the Sea Convention] (declaring high seas and deep seabed immune to acquisition) (not yet in force); Geneva Convention on the High Seas, Apr. 29, 1958, art. 1, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (for ocean areas beyond national territorial waters).

134. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. 2, 18 U.S.T. 2410, T.I.A.S. No. 6347, 60 U.N.T.S. 205 ("Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."); *see also* Bosco, *Liability of the United States Government for Outer Space Activities which Result in Injuries, Damages or Death According to United States National Law*, 51 J. AIR L. & COM. 809 (1986).

135. For more on the common heritage principle, see Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L.Q. 190 (1986); Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983); Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECH [ZaoRV] 312 (1983). For its application to Antarctica, see Joyner & Lipperman, *supra* note 121, at 31-33 (arguing that the common heritage principle "has failed to achieve the well-recognized status of accepted customary law").

136. *Terra nullius* are those areas that "are free for the use and exploitation of all and [where] persons are not deprived of the protection of the law merely because of the absence of state sovereignty. . . ." I. BROWNLIE, *supra* note 63, at 180.

137. "The *res communis* may not be subjected to the sovereignty of any state . . . and states are bound to refrain from any acts which might adversely affect [their] use. . . ." *Id.* at 181.

138. *But see Beattie*, 756 F.2d 91, 106-07 (D.C. Cir. 1984) (Scalia, J., dissenting) (for contrary view).

139. *Beattie*, 592 F. Supp. 780, 781 (D.D.C. 1984) (Greene, J.).

working definition of "country." If "country" is a synonym for "nation," then the premise can be accepted: Antarctica is not a country. On the other hand, if it merely means an "area" or "region" without a political basis,[140] then it becomes a nonsense. If "country" has no political meaning, then it can hardly be coupled with "foreign," which obviously does.

One may thus conclude that no sovereign exists in Antarctica. Nonetheless, states do have some jurisdictional competences there.[141] Some of these are granted under the Antarctic Treaty.[142] Others are premised on a nation's right to prescribe "the conduct, status, interests, or relations of its nationals outside its territory,"[143] including the enforcement of its criminal laws.[144] Still other jurisdictional practices derive from the con-

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140. *See Beattie*, 756 F.2d at 109-10 (Scalia, J., dissenting).

141. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) [hereinafter RESTATEMENT (THIRD)] (describing various forms of jurisdiction, including that to prescribe, enforce, and adjudicate).

142. *See* Antarctic Treaty, *supra* note 126, art. VIII, para. 1 (providing that observers, designated under the provisions of art. III, para. 1(b), and members of their staffs, "shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions"). All other persons, both civilian and military, are not so privileged. *See* Bilder, *supra* note 125, at 237-38. Jurisdictional disputes involving non-privileged personnel are resolved merely through consultation "with a view to reaching a mutually acceptable solution." Antarctic Treaty, *supra* note 126, art. VIII, para. 2.

American treaty observers are thus unquestionably under the jurisdiction of the United States. If they were to commit a tort, there seems little doubt that it would be attributable to the United States under the FTCA, depending on a determination involving Antarctica as a "foreign country." Of course, any act by an observer would also likely be exempted from federal tort claims jurisdiction under the "discretionary function" exception. 28 U.S.C. § 2680(a) (1982).

143. RESTATEMENT (THIRD), *supra* note 141, § 402(2). *See also supra* note 114. *See generally* Carl, *The Need for a Private International Law Regime in Antarctica*, in THE ANTARCTIC LEGAL REGIME 65 (C. Joyner & S. Chopra eds. 1988) (for overview of conflict of laws problems in Antarctica).

144. *See* Note, *United States Criminal Jurisdiction in Antarctica: How Old is the Ice?*, 9 BROOKLYN J. INT'L L. 67, 76-77 n.51 (1983) (listing instances in which Antarctic claimant states have extended their criminal laws over nationals operating on the continent) [hereinafter Brooklyn Note]. Although the United States has not specifically extended its criminal law to Antarctica, a 1984 amendment to the provision of the federal criminal code dealing with the special maritime and territorial jurisdiction of the United States implicitly accomplished this. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, title II, ch. 12, part H, § 1210, 98 Stat. 2164 (codified at 18 U.S.C. § 7(7) (Supp. IV 1986)); *see also* Brooklyn Note, *supra*, at 79-81 (detailing early legislative history of this amendment).

The United States does not recognize other nation's criminal jurisdiction over Americans in Antarctica. *But see* Agreement on Operations in Antarctica, Dec. 24, 1958, U.S.-

sensus decisions of the Antarctic consultative powers.[145] The fact that nations having a presence in Antarctica exercise jurisdiction for any of these purposes does not derogate the continent's status as "sovereignless" in international law.[146] Consequently, the extension of federal tort claims jurisdiction to Antarctica would not violate international law.

B. *Jurisdictional Complications*

Failing to treat Antarctica as a foreign country does not offend international law. But that is not enough: such a characterization must also comport with American practice. Similarly, even though Antarctica has no "sovereign," it is important to determine the extent to which American law recognizes any sort of jurisdiction on the continent. Some of these circumstances have already been discussed,[147] but only one has any direct impact on the question of federal tort claims jurisdiction in the region.

N.Z., 9 U.S.T. 1502, T.I.A.S. No. 4151, *renewed indefinitely*, Oct. 18, 1960, 11 U.S.T. 2205, T.I.A.S. No. 4591 (exempting American operations in New Zealand from taxation, customs duties, radio station licensing, and criminal jurisdiction in minor cases). This agreement does not define New Zealand to include any part of Antarctica. Moreover, while other states may recognize New Zealand's claim to the area in which McMurdo Station and Mount Erebus are situated (and where the plane crash occurred, *see supra* note 1 and accompanying text), F. AUBURN, ANTARCTIC LAW, *supra* note 129, at 29; F. AUBURN, THE ROSS DEPENDENCY 5, 70-73 (1972) (reflecting uncertainty as to whether New Zealand is actually administering the claim for Britain); P. QUIGG, A POLE APART: THE EMERGING ISSUE OF ANTARCTICA 113 (1983), the United States does not. *See supra* notes 130, 131 and accompanying text.

145. *See supra* note 126. One example of this involved the conservation measures adopted by the Antarctic Consultative Powers at their eighth meeting. These were implemented in United States law by the Antarctic Conservation Act of 1978, Pub. L. No. 95-541, 92 Stat. 2048 (codified at 16 U.S.C. §§ 2401-12 (1982)). The Conservation Act prohibits certain activities that degrade the Antarctic environment, *id.* § 2403; establishes a permit system, *id.* § 2404; provides for both civil and criminal penalties, *id.* §§ 2407-08, other enforcement measures, *id.* § 2409; and vests jurisdiction over these matters in the district courts, *id.* § 2410. Aside from the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982), this jurisdictional provision is the only alternative to the FTCA in Antarctica and might be invoked as an independent basis for jurisdiction if a Government official or employee were in violation of the Conservation Act.

146. *But see* Beattie v. United States, 756 F.2d 91, 111 (D.C. Cir. 1984) (Scalia, J., dissenting). Judge Scalia argued that "[t]he exercise of such jurisdiction presupposes a claim; the United States has asserted no claim. . . ." *Id.* This entirely ignores the fact that jurisdiction can be based on something other than territorial sovereignty. *See supra* notes 141-45 and accompanying text. *See also* Carl, *supra* note 143.

147. *See supra* notes 141-45 and accompanying text.

As noted above,[148] tort claims against the United States arising on the high seas are actionable under the Suits in Admiralty Act, and not the FTCA. Furthermore, admiralty jurisdiction is adjudged by reference to the site of the injury,[149] and not the location of the act or omission which caused the tort.[150] A few hypotheticals illustrate the problems raised by these distinctions. Had the New Zealand Airlines jet crashed into the Southern Ocean, instead of on the Antarctic mainland,[151] then it would have been subject to admiralty jurisdiction; claims under the Death on the High Seas Act could have been pursued against the Government through the Suits in Admiralty Act. This would have been true irrespective of whether the site of the alleged fault was on land (at the McMurdo Sound base) or at sea, provided that a sufficient nexus of causation was proved.[152]

A difficulty arises if the site of the injury is one of the many permanent ice shelves that extend out for considerable distances from the Antarctic mainland, and which, in winter, may cover the entire Southern Ocean.[153] If ice-covered areas are assimilated to the high seas,[154] then admiralty jurisdiction remains unaffected. Yet, some authorities have made a distinction based on the salt content of the ice.[155] They argue

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148. *See supra* notes 46-49 and accompanying text.

149. *See supra* note 50 and accompanying text.

150. *See supra* notes 22-25 and accompanying text.

151. *See supra* note 1 and accompanying text.

152. *See supra* note 50.

153. *See* Bilder, *supra* note 125, at 252.

154. Whether sea-ice is more like land or ocean has exercised the minds of a number of international law publicists. For the view that sea-ice may not be occupied like land, see International Law Commission, *Report on the Regime of the Territorial Sea* 20, *reprinted in* [1952] 2 Y.B. INT'L L. COMM'N 32; Harvard Law School Research in International Law, *Jurisdiction with Respect to Crime*, art. 10, comment, *reprinted in* 29 AM. J. INT'L L. SUPP. 573, 585-86 (1935) ("It is extremely doubtful whether . . . ice fields or ice floes can be regarded as territory or subject to territorial authority."). For those writers who believe that fixed ice is subject to occupation, see Waldock, *supra* note 122, at 318 (for citations). *See also* 1982 Law of the Sea Convention, *supra* note 133, art. 234 (for provision on protection of ice-covered areas). Nevertheless, the international conventions on the law of the high seas, *supra* note 133, do not seem to allow a state to draw a baseline for the purposes of delimiting its territorial sea and exclusive economic zone (EEZ) from an ice shelf. 1982 Law of the Sea Convention, *supra* note 133, art. 5.

155. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 587 (H. Lauterpacht 8th ed. 1955) (defining the high seas as a "coherent body of salt water"); *see also* Brooklyn Note, *supra* note 144, at 78. "Antarctic ice exists in three major forms: ice sheets formed at the surface of the land by the freezing of fresh water or the compacting of snow; pack ice formed by the freezing of snow water, and ice shelves, formed on the surface of the sea, which attach to the land and can attain the thicknesses of 500 - 1,000 feet." *Id.* at 78

that high sea status is precluded because, after two years, pack ice attains characteristics approximating fresh water.[156] Under this theory, incidents occurring on the permanent ice shelves would not be on the high seas and would be beyond the admiralty jurisdiction of the United States.[157] In practice, then, any torts occurring either on the permanent ice shelves or land mass of Antarctica would be actionable only under the FTCA.

C. *Application of "Foreign Country" Tests*

Considering that Antarctica has no sovereign and that the United States has some limited jurisdictional powers on the continent, it remains to test the theories explored above which give content to, and define, the phrase "foreign country." Predictably, these theories do not yield a consistent result in answering whether Antarctica is a foreign country for purposes of the FTCA. More importantly, applying these tests to Antarctica graphically illustrates the respective problems and prospects of each, while also indicating the likely success or failure in applying the theories to other situations.

The literalist and venue theories can be readily tested. Obviously, the decisive element for the venue test is not present because no federal judicial district encompasses Antarctica.[158] As suggested above, this acts as a particular bar to foreign plaintiffs.[159] Although this apparent categorical ban on aliens suing the United States Government was arguably one of the original rationales of the foreign country exception,[160] it was later repudiated.[161] Even so, a non-American injured by Government negligence in Antarctica would be barred from instituting a suit under this theory.[162] The related literalist theory, which grants foreign country sta-

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n.55. *But see* Bernhardt, *supra* note 122, at 302-10 (rejecting this theory).

156. *See* Brooklyn Note, *supra* note 144, at 78-79.

157. *But see* United States v. Escamilla, 467 F.2d 341, 343 (4th Cir. 1972). In this case, defendant was convicted of having committed involuntary manslaughter on Fletcher's Ice Island T-3 in the Arctic Ocean. While there were conflicting United States and Canadian claims of sovereignty over the area, all personnel on the ice floe were Americans. Canada apparently raised no objection to the ice island being treated like a ship for the purposes of jurisdiction. *See also* Auburn, *International Law and Sea-Ice Jurisdiction in the Arctic Ocean*, 22 INT'L & COMP. L. Q. 552 (1973).

158. *See supra* notes 92-94 and accompanying text.

159. *See supra* note 93 and accompanying text.

160. *See supra* notes 9, 10 and accompanying text.

161. *See supra* note 11 and accompanying text.

162. Judge Scalia, dissenting in *Beattie*, suggested that the failure to apply this venue approach "would bar a New Zealander from suing an employee of the United States (even if that employee happened to be a New Zealand national) for a tort committed by that employee in Antarctica." Beattie v. United States, 756 F.2d 91, 112 (D.C. Cir.

tus to any entity which is either outside the sovereignty of the United States or situated where American law does not exclusively control,[163] would conclude that Antarctica is just such a place. The continent clearly fails both mandatory forms of the sovereignty and foreign law concerns. The United States is not sovereign because no state is sovereign in Antarctica; no nation's law applies exclusively there. Indeed, conditions in Antarctica illustrate how restrictive this test is because it combines both mandatory elements of the foreign country equation.[164]

The statutory theory has a special distinction because it is the only approach to defining a foreign country that has been applied explicitly to Antarctica. In *Martin v. Commissioner*,[165] the United States Tax Court considered whether earnings received by the petitioner on an Antarctic expedition were subject to tax because they were earned in a foreign country.[166] The Internal Revenue Service had adopted a definition of foreign country entirely consistent with other statutory definitions.[167] The Tax Court accordingly ruled that Antarctica is not a foreign country under that test.[168] Because the court emphasized a permissive finding of sovereignty (that is, a foreign country is only a place within the sovereignty of another political entity), the result was inevitable since there was no question that Antarctica has no sovereign.[169] This approach was also taken by the district court in *Beattie v. United States*,[170] and followed in the court of appeals, which upheld the finding that Antarctica is not a foreign country for purposes of the FTCA.[171]

1984). The reason for this is the supposed exclusivity of the FTCA remedy. *See* 28 U.S.C. § 2679 (1982). Of course, other nations need not respect that exclusiveness and could make a claim directly against the United States Government.

163. *See supra* notes 89-91 and accompanying text.

164. *See supra* notes 88, 89, 91 for other applications of this test.

165. 50 T.C. 59 (1968).

166. *See* 26 U.S.C §§ 911(a)(1), (b)(1)(A) (Supp. IV 1986) (excluding from earned income "the amount received by [an] individual from sources within a foreign country. . .").

167. *See* Treas. Reg. § 1.911-2(h) (1987) ("The term 'foreign country' when used in a geographical sense includes any territory under the sovereignty of a government other than that of the United States."). *See also supra* notes 95-97 and accompanying text (for other statutory definitions).

168. 50 T.C. at 62. The court thus taxed petitioner's income. *Id.*

169. This was a stipulation of fact in *Martin*. *Id.*

170. 592 F. Supp. 780, 791 (D.D.C. 1984) ("[Antarctica] is not under the domination of any other foreign nation or country.").

171. *Beattie*, 756 F.2d at 94. *Cf.* Procter & Gamble Manufacturing Co. v. United States, 19 C.C.P.A. 415 (1932), *cert. denied*, 287 U.S. 629 (1932) (whale oil produced on Norwegian ship in Ross Sea subject to United States customs duties because it came from foreign country).

The result under the sovereignty theory, which promotes only a mandatory view of that policy concern,[172] is likewise predetermined by a finding that the United States is not sovereign in Antarctica. The fact that *no* state is sovereign is irrelevant. Moreover, the judicial gloss in defining sovereignty,[173] which ignores the possibility that sovereignty could be shared, vastly limits the relevance of the sovereignty theory to Antarctica; for, in any real sense, sovereignty is held in common by the Antarctic treaty powers.[174] Although this form of *condominium*[175] is certainly disputed by those nations that do not have consultative status[176] and, instead, espouse the view that Antarctica is the common heritage of mankind,[177] it still neatly describes the relationship between the signatories of the Antarctic Treaty. Yet, to apply the sovereignty theory in a fashion that would allow claims against the Government by nationals of parties to the Treaty (on the assumption that they are, in essence, conationals in Antarctica), while excluding other persons, appears to be inconsistent with its categorical nature. Nevertheless, that is the only workable solution possible with any test of foreign country which places decisive weight on the presence or absence of a sovereign in Antarctica.

The foreign law theory features the same tension between its mandatory and permissive forms, but is still more relevant for Antarctic legal conditions. The mandatory version of the theory would hold a jurisdiction to be a foreign country if any nation other than the United States can apply its tort law there. Even if other nations had never statutorily applied their own laws to events occurring on the continent,[178] such laws indisputably would apply of their own force to cases in which one foreign national injures a person with the same citizenship.[179] Moreover, each party to the Antarctic Treaty maintains exclusive jurisdiction

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172. *See supra* notes 100-04 and accompanying text.

173. *See supra* note 102.

174. *See supra* notes 126-29 and accompanying text.

175. *See* I. BROWNLIE, *supra* note 63, at 118-19 (describing the regimes of nineteenth century Sudan and New Hebrides). *See also* Dutch-Prussian Condominium Case, 6 Ann. Dig. no. 23 (1930-31) (decision of 1816). *See also* The Spitzbergen Treaty, Feb. 9, 1920, 43 Stat. 1892, T.S. No. 686, 2 L.N.T.S. 8 (recognizing Norway's sovereignty over the Arctic Archipelago in exchange for free access by the other signatories (including the United States) for mining and commercial purposes); Bernhardt, *Spitzbergen: Jurisdictional Friction Over Unexploited Oil Reserves*, 4 CAL. W. INT'L L. J. 61 (1973).

176. *See supra* notes 126, 128.

177. *See supra* note 135 and accompanying text.

178. *But see supra* note 144 (reciting instances of nations applying their criminal laws to Antarctica).

179. *See supra* note 114.

over nationals it designates as privileged observers.[180]

Under the permissive test for the presence of foreign law in a territory, an area may not be deemed a foreign country for the purposes of the FTCA if other nations can apply their tort law—provided that application is not exclusive. The only question that must be answered in applying this form of the foreign law test is whether another nation has exclusively and entirely imposed its tort law in any given instance.[181] Because there can be no territorial basis for such an assertion of jurisdiction, one nation's tort law could be applicable only when both the tortfeasor and victim shared the same nationality.[182] Thus, if an American Government employee injured another American, United States law would unambiguously apply and Antarctica would not be deemed a foreign country.[183] Cases involving an American victim and another government's negligent employee would obviously not arise under the FTCA.

That leaves a situation, as occurred in *Beattie*, in which a foreign national is injured by the negligence of an American Government employee. This contingency is answered by the choice of law variant of the foreign law concern. The theory holds that the FTCA should provide potential relief even if New Zealand law was applied to the airliner crash, due to some putative claim of New Zealand to the area in which the McMurdo base and Mount Erebus are situated,[184] or because of tacit United States recognition,[185] or simply because a New Zealander is a plaintiff in the action. Such a policy approach would usually demand that an area not be deemed a foreign country, and that the claim be permitted. This rationale was implicitly invoked by the district court in *Beattie* to allow that action.[186]

The policy concern attendant here is simply that if the action is not allowed under the FTCA, the only way that foreigners could seek relief would be through the espousal of a claim by their government and sub-

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180. *See supra* note 142 and accompanying text.

181. *See supra* notes 111, 112 and accompanying text.

182. *See supra* notes 113-15 and accompanying text.

183. Even Judge Scalia conceded this in his *Beattie* dissent. *See* Beattie v. United States, 756 F.2d 91, 113 n.7 (D.C. Cir. 1984).

184. *See supra* note 144. Judge Scalia, in *Beattie*, apparently believed that New Zealand exercised sufficient sovereignty over the area for it to qualify as a "foreign country." 756 F.2d at 107-08 (Scalia, J., dissenting).

185. *See supra* note 144 (discussing United States agreement with New Zealand concerning Antarctic operations).

186. 592 F. Supp. at 783-84 ("If the government's motion to dismiss is granted, no one will be held liable for [the negligence causing the crash], and the survivors will not be able to claim or receive damages for these actions.") (Greene, J.).

sequent diplomatic settlement or arbitration. On the other hand, applying choice of law logic may result in a finding that Antarctica is, indeed, a foreign country. Allowing foreign claimants to proceed may work an injustice on later American tort victims, absent some explicit form of reciprocity permitting an American injured by a New Zealand official to sue that government. Such a result would simply permit other foreign nationals to sue the United States Government, without any assurance that other governments would waive sovereign immunity in their own courts if they were the tortfeasor.[187] Adopting this policy, while certainly humane in the case of the families of the Air New Zealand crash victims, might compromise the chances of an American claimant. Any court employing this particular approach would have to weigh carefully the political ramifications of either denying or accepting such a foreign claim.[188] For these reasons, the choice of law theory may be unsuited to federal tort claims arising in Antarctica.

As predicted, application of the various theories of foreign country produces divergent results.[189] It is manifest, however, that a test which emphasizes the presence or absence of foreign law is more relevant than one which incorporates or propounds a test of sovereignty. The absence of a territorial sovereign in Antarctica gives little scope of application to

187. Under these facts, suit against a foreign government in United States courts is impossible under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1605(a)(5) (1982) (permitting suits for tort damages provided injury occurred in United States); *see also* Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842-43 (D.C. Cir.) (requiring that both tort and injury occur in the United States), *cert. denied*, 469 U.S. 881 (1984). Action might be possible under the Alien Tort Claims Act, 28 U.S.C. § 1350, if the act complained of rises to a "violation of the law of nations or a treaty of the United States." *Id. But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir.) (per curiam) (rejecting claims for wrongful death arising from terrorist incident), *cert. denied*, 470 U.S. 1003 (1985).

188. Such a judicial determination may well be illegitimate, since it might implicate "political questions" involving the international law status of Antarctica that must be left to the executive branch of government for determination. *See supra* note 119.

189. A summary of theories and results for Antarctica:

Theory [Concern(s)] (Tendency)	Result
Literalist [Sovereignty/Foreign Law] (Mandatory)	FC
Venue [Sovereignty/Foreign Law] (Mandatory)	FC
Statutory [Sovereignty] (Permissive)	NFC
Sovereignty (Mandatory)	FC
Foreign Law (Mandatory)	FC
Foreign Law (Permissive)	NFC
Choice of Law [Foreign Law] (Permissive)	FC

Where FC means "foreign country" and NFC means "not a foreign country."

the "literalist," "statutory," or "sovereignty" theories. One need only decide whether to adopt the permissive (statutory) or mandatory (sovereignty or literalist) form of the inquiry to have an answer. Moreover, to adopt any mandatory test, whether of sovereignty or of the presence of foreign law, is to really diminish and ignore the salient, and important, characteristics of such modern jurisdictional types as extraterritorial regimes,[190] *condominia*,[191] and areas subject to no power and to no law.[192]

The permissive form of the foreign law inquiry is the only combination on the matrix that can accommodate the complex international law characteristics of most jurisdictions and, at the same time, produce consistent results. It can, and has, been abused and misapplied.[193] It can, and has, been carried to extremes in avoiding a finding of a location as within a "foreign country."[194] Nevertheless, it offers the only definition of foreign country capable of reconciling international law with the domestic practice of the FTCA. Under the permissive form of the foreign law inquiry, Antarctica is not a foreign country in cases concerning an injured American. In incidents involving other nationals, jurisdiction should be denied unless the United States and the other country have concluded a reciprocal agreement which permits a waiver of sovereign immunity when an American is injured by that state's activities.[195]

IV. Additional Concerns about Claims Arising in Antarctica

A. *Venue*

Three possibilities exist for establishing venue with a claim from Antarctica. First, residents of the United States may bring the action in the judicial district where they live.[196] Second, actions by non-residents of the United States may be characterized as headquarters claims in which the alleged act or omission occurred in the United States.[197] Venue

190. *See supra* notes 64, 94.

191. *See supra* note 175.

192. *See supra* notes 133-37 and accompanying text.

193. *See supra* notes 80-82 and accompanying text (discussing application of the theory to areas occupied by the United States during the Second World War).

194. *See supra* notes 117, 118 (applying the "choice of law" variant to the Agent Orange claims arising in Vietnam).

195. Such agreements could be placed on a bilateral footing with all other countries having a significant presence in the Antarctic, or, alternatively, under the aegis of the Antarctic Treaty regime.

196. *See* 28 U.S.C. § 1402 (1982).

197. *See supra* notes 24-30 and accompanying text.

would be properly vested in the judicial district of that locale.[198] Finally, when only a portion of the claims could be entertained at the "headquarters" venue, the other causes of action may be heard at that forum under the doctrine of "pendent venue."

This last option technically defeats the very requirement of venue,[199] but it is consistent with the notion that "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids having such a gap."[200] One method of construction would allow concurrent jurisdiction over pendent claims when venue is properly at the "headquarters." Three requirements are implicit in this jurisdictional allowance. First, those parts of the action where the venue properly is in Antarctica must not be precluded under the foreign country exception. If they were, the court would be denied subject matter jurisdiction irrespective of venue. Furthermore, the prudential concern of the "venue gap" would be nullified if Congress refused to grant jurisdiction in the first place.[201]

Second, the headquarters claim must be tenable in its own right. Viability, in this sense, has two elements. The first is that the plaintiff must prove a nexus between the negligence in the United States and the injury abroad. Although this proximate cause determination is not as strict as the one Judge Scalia proposed in his dissent in *Beattie*,[202] it is substantial enough to dismiss any headquarters claim from the outset.[203] Next, the Antarctic claims must arise from the same cause of action as the headquarters claims.[204] The court of appeals in *Beattie* found that a complaint alleging two counts of negligence (the actions of the McMurdo air traffic controllers, as well as their faulty training and supervision from Washington) was really a cause of action for an "essentially single

198. *See* 28 U.S.C. § 1402 (1982).

199. The general rule is that venue must be established as to each separate cause of action. 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 3808 (2d ed. 1986).

200. Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 710 n.8 (1971).

201. *Id.*

202. 756 F.2d 91, 122 (D.C. Cir. 1984) (Scalia, J., dissenting). *See also supra* notes 36-40 and accompanying text.

203. *See supra* notes 30, 41 (citing cases in which other headquarters claims were dismissed).

204. *See, e.g.*, Lamont v. Haig, 590 F.2d 1124, 1135 (D.C. Cir. 1978).

wrong,"[205] the death of the New Zealand Airlines passengers.[206] In other cases, particularly those in which the nexus between the headquarter's negligence and the Antarctic injury is already tenuous, this common cause of action may be difficult, if not impossible, to demonstrate to the satisfaction of a federal court.

Finally, whether to invoke pendent venue lies within the discretion of the district court.[207] Among the factors taken into account are "those that support the exercise of pendent jurisdiction — judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the litigants."[208] Other considerations, unique to a venue determination, are the convenience of the litigants, witnesses, and the court itself.[209] Even if the other factors weighing in favor of pendent venue — unquestioned subject matter jurisdiction and viability of the headquarters claim—are satisfied, the claimant must still win an exercise of discretion by the court.

B. *Choice of Law*

The law to be applied in a headquarters claim is that of the jurisdiction where the headquarters is located.[210] However, when Antarctica is the locus of a claim, a serious problem arises: The continent has no tort law of its own to apply in a claim against the Government.[211] Given this situation, it is necessary to make a conscious choice of law.[212] Such a

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205. Hurn v. Oursler, 289 U.S. 238, 246 (1932).

206. *Beattie*, 756 F.2d at 101. Judge Scalia wrote a stinging dissent on this point. He suggested that the majority's emphasis on a common "cause of action" was misguided, since the concept of a "claim," as used in the FTCA and in more recent jurisprudence, was much narrower and was meant to include only a "common nucleus of operative fact." 756 F.2d at 118-20 (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966)). Judge Scalia went on to dispute whether any headquarters claims were even presented in the case. *Id.* at 120-27. *See supra* notes 4, 36-40 and accompanying text.

207. *Beattie*, 756 F.2d at 103.

208. *Id.*

209. *Id.* These factors also implicate *forum non conveniens* concerns.

210. *See* 28 U.S.C. § 1346(b) (1982).

211. The fact that the United States would have personal jurisdiction over its nationals on the continent, *see supra* notes 143, 144 and accompanying text, does not give content to that tort law.

212. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter CONFLICTS RESTATEMENT (SECOND)]. The *Restatement* gives the following factors to consider in such a determination:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those

choice would require weighing the interests of a United States forum[213] with that of the Antarctic forum. Obviously, Antarctica is an unformed entity and has no law, no forum, and no interest in the outcome of a suit against the United States Government.[214] In a sense, no choice is made because no other law is supplanted.[215]

This approach is entirely consistent with the definition for a foreign country adopted above. If any possibility existed that another nation's law might apply to an action against the Government, one of the essential rationales for the foreign country exception would be entirely defeated.[216] It would offend the very choice of law principles invoked.[217] It would also compel an aggressive finding that the foreign law conflicts with a strong policy of the American forum, a politically unsavory expedient.[218]

It is no surprise, therefore, that the court in *Beattie* adopted the tort law of the District of Columbia once it found subject matter jurisdiction and venue by virtue of the headquarters claims.[219] While Judge Scalia,

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states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
Id. § 6.

213. This would either be the state where the headquarters claim arose or where the plaintiff(s) reside.

214. The only interest, which is held collectively by the parties to the Antarctic Treaty, *supra* note 126, is that no exercise of jurisdiction purport to be a claim of sovereignty.

215. *Cf.* Sami v. United States, 617 F.2d 755, 763 (D.C. Cir. 1979) (rejecting possibility that West German law would be applied to claim brought for false imprisonment because such an application would conflict with "a strong public policy of the forum"); *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (rejecting Vietnamese law as unsuitable). *See supra* notes 117, 118 and accompanying text.

216. *See supra* notes 14, 86, 87 and accompanying text.

217. *See* CONFLICTS RESTATEMENT (SECOND), *supra* note 212, § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").

218. *See* RESTATEMENT (THIRD), *supra* note 141, § 403 (1986) (setting out limits on the exercise of jurisdiction to prescribe). Comparing the two *Restatements* indicates a subtle tension between domestic and international choice of law rules. Essentially, the international rules emphasize "reasonableness," *id.*, comment a, whereas the domestic rules compel a balancing of interests. Once again, a finding that a foreign law is not applicable has political consequences that make judicial determination problematic. *See supra* note 188.

219. *Beattie*, 756 F.2d 91, 104-05 (D.C. Cir. 1984).

in dissent,[220] objected to this apparent violation of the FTCA's own choice of law provision,[221] a concurring opinion defended the court's decision on the ground that some law had to be applied to an otherwise admissible action, and the only choice was the law of the headquarters forum.[222]

V. CONCLUSION

For federal tort claims arising in Antarctica, issues of venue and choice of law are inextricably linked to the question whether a court has subject matter jurisdiction, that is, whether Antarctica is a "foreign country." Once jurisdiction is confirmed, venue is validated either by means of identifying the plaintiffs' domicile (if they are residents of the United States), or the locus of their headquarters claim (if they are not residents). The tort law used is that of either of those forums.

Because the admissibility of claims arising in Antarctica hinges entirely on the meaning of the opaque phrase "foreign country," this Article has provided both a complete taxonomy of cases considering the exception, as well as a theoretical scheme to evaluate the meaning of the definitions employed. The reason for such analytical complexity is that Congress, in drafting the foreign country exception, had in mind two distinct rationales that are, in some ways, competing and incompatible. Protecting American sovereignty was discussed but not acted upon. Ensuring that claims against the United States be governed by American law was expressed but not elaborated: places where the United States is sovereign are not necessarily those places where United States law applies. The gap between these two approaches widens further when one considers that each has two forms. The mandatory form dictates that the United States be sovereign and that its law be exclusively applied, while the permissive form merely requires that no other nation be sovereign and no other nation's law exclusively control. Once again, these four concepts produce different results. Courts do not conjure up concepts. They apply judicial tests, bundles of words that have picked up and discarded strands from each of these ideas. The result is a bewildering array of theories emphasizing different concerns, tempered by mandatory or permissive tendencies.

All this to define two seemingly simple words. This Article suggests an answer that perhaps makes sense in the Antarctic context and which

220. *Id.* at 129-30 (Scalia, J., dissenting).
221. 28 U.S.C. § 1346(b) (1982). *See supra* note 21 and accompanying text.
222. *See Beattie*, 756 F.2d at 138-43 (Wald, J., concurring).

can be applied to other jurisdictions in which a tort action against the United States Government might arise. The proposed solution embraces the Congressional intent of precluding foreign law from domestic claims. It recognizes that sovereignty is only a surrogate for characterizing those jurisdictions within the foreign country exception. Because international law is no longer absolute in its conception of sovereignty, its value as a determinative test of a foreign country has waned, leaving a difficult, but at least answerable, inquiry of the presence or absence of foreign law in a particular locale. Moreover, this question was meant to be posed in a negative fashion: Does another nation's tort law apply exclusively in an area? If so, then it is a "foreign country." If not, the claim will not be barred by the exception.

As the world shrinks, and even common spaces come under state control, fewer areas will be "sovereignless." Antarctica may, one day, come under the territorial control of a number of nations. In the meantime, explorers, scientists, and tourists will visit the continent. A few will die there, and some of those deaths may be attributed to an aspect of this country's vigorous presence in Antarctica. Clarification of the foreign country exception thus appears more warranted than ever. As for the victims of the Air New Zealand crash, their remains on Mount Erebus have been left untouched, a poignant memorial that Antarctica is, at least in one sense, "foreign." While Antarctica is at once unique, mysterious and deadly, we must nevertheless remind ourselves that where we have left our dead, no place is really a foreign country.