



# UC DAVIS

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## LAW REVIEW

UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW • VOL. 42, No. 1, Nov. 2008

### Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976

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*Many foreign states are active players in global commerce. When these states establish or control global enterprises, those entities often seek special treatment available under the Foreign Sovereign Immunities Act. Courts only allow such special treatment to enterprises that are “organs of a foreign state,” a murky term undefined in the statute and undertheorized in the literature. This Article argues that in determining when an enterprise is an “organ,” courts should focus on whether the denial of sovereign status has the potential to interfere with diplomatic relations between the United States and the relevant foreign state.*

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The United States Supreme Court recently highlighted the importance of this question when it granted certiorari to consider whether a Canadian power company was an organ. The Court ultimately dismissed that case on jurisdictional grounds, leaving the issue unresolved for the short term. The need for clarity will only heighten as the web of globalization tightens and the concurrent explosion in the number and variety of entities with significant ties to foreign sovereigns, including Public/Private Partnerships and Sovereign Wealth Funds, increases litigation of this issue.

To measure the potential for interference with the conduct of foreign relations, courts must look at the extent to which the sovereign would be justifiably affronted if the entity were not treated as its organ. In creating a workable standard by which to measure this risk, this Article borrows heavily from the conceptually similar doctrines of the “arm of the state” in Eleventh Amendment jurisprudence and “alter ego” veil piercing in corporate law. Ultimately, this Article’s proposal synthesizes the existing precedent with those doctrines to provide a coherent approach to resolving the confusion surrounding how far the sovereign’s cloak should spread over related entities.

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#### INTRODUCTION

The Foreign Sovereign Immunities Act of 1976 (“FSIA”) provides the exclusive vehicle for lawsuits against foreign sovereigns and their agencies and instrumentalities.<sup>1</sup> It provides sovereigns and their agencies and instrumentalities with presumptive immunity,<sup>2</sup> which is abrogated only if one of the enumerated statutory exceptions applies,<sup>3</sup> and other valuable procedural protections<sup>4</sup> that apply regardless of the ultimate decision on immunity.<sup>5</sup> Entities seeking treatment as agencies or instrumentalities of a foreign state must establish that they are either “organs” or majority-owned subsidiaries of the relevant sovereign.<sup>6</sup> For those entities that do not or cannot satisfy the ownership requirements, “organ” is the only refuge. Unfortunately, Congress left this term undefined and courts have struggled with it since.<sup>7</sup>

The significance of resolving this confusion cannot be denied — in 2007 the United States Supreme Court granted certiorari to consider whether a Canadian power company was an organ of the Canadian government.<sup>8</sup> Although the Court ultimately dismissed the case on

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<sup>1</sup> 28 U.S.C. §§ 1330, 1602 (2000); *id.* § 1603 (2000 & Supp. V 2005); *id.* § 1604 (2000); 28 U.S.C.A. §§ 1605, 1605A (2008); 28 U.S.C. § 1606 (2000); 28 U.S.C.A. § 1607 (2008); 28 U.S.C. §§ 1608-09 (2000); 28 U.S.C.A. § 1610 (2008); 28 U.S.C. § 1611 (2000); *see also* *Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992).

<sup>2</sup> *See* 28 U.S.C. § 1604.

<sup>3</sup> *See id.* §§ 1605, 1607.

<sup>4</sup> *See infra* notes 56-66 and accompanying text; *see also* Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 386, 393-96 (1982).

<sup>5</sup> *See* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983).

<sup>6</sup> The FSIA defines “agency or instrumentality” as a separate legal entity that is either owned by or an organ of a foreign state or one of its political subdivisions and is not a citizen of the United States nor organized under the laws of a third country. *See* 28 U.S.C. § 1603(b). Because there is no distinction between the organ of a foreign state and the organ of a political subdivision thereof, I will henceforth refer only to organs of foreign states.

<sup>7</sup> *See* *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206 (3d Cir. 2003).

<sup>8</sup> *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 1144, 1144 (2007) (granting certiorari on question of whether Powerex was organ of political subdivision of Canada and directing parties to brief question of whether lower courts properly exercised removal jurisdiction).

jurisdictional grounds,<sup>9</sup> ever-increasing globalization<sup>10</sup> and the concurrent explosion in the number and variety of entities with significant ties to foreign sovereigns, such as Public-Private Partnerships (“PPPs”) and Sovereign Wealth Funds, will only increase litigation of this issue.<sup>11</sup>

The lower courts have struggled to create a definition of “organ” that evaluates the relationship between the entity in question and the sovereign in a way that addresses the wide variety of structures and political and economic systems that spawn them.<sup>12</sup> The majority of courts follow a multi-factor balancing test that focuses on the control the foreign government can or does exert over the entity.<sup>13</sup> Other courts apply the so-called “public activity” test, asking whether the entity performs some public function for the foreign state.<sup>14</sup> In conducting either inquiry, however, the courts consider many of the same factors.<sup>15</sup>

These tests have lead to unpredictable and, occasionally, arbitrary results.<sup>16</sup> Despite this, commentators have largely ignored the issue,

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<sup>9</sup> *Id.*

<sup>10</sup> The legislative history notes that the increasing frequency of interactions and potential disputes between Americans and foreign state entities was one of the factual predicates for the codification of the FSIA. H. R. REP. NO. 94-1487, at 6-7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604-06; see also Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View*, 35 INT’L & COMP. L.Q. 302, 302 (1986).

<sup>11</sup> It also bears noting that the organ question has taken on a more prominent role since the Supreme Court’s decision in *Dole v. Patrickson* in 2003. In *Dole*, the Court held that the other method of achieving agency or instrumentality status, showing majority ownership by a foreign government, required that the government directly hold the shares. *Dole v. Patrickson*, 538 U.S. 468, 480 (2003). This overturned the precedent in many circuits, which allowed interests to be traced back through the governments through other corporate (or other types of) separate entities. Before *Dole*, the majority of entities argued that they were owned by the foreign state. See, e.g., *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) (noting that most cases used “ownership” rather than “organ” to determine agency or instrumentality status).

<sup>12</sup> See, e.g., *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (noting that definition of agency or instrumentality “is ill-suited to concepts which exist in socialist states such as the Soviet Union”).

<sup>13</sup> See *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *Kelly*, 213 F.3d at 846-47.

<sup>14</sup> See *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003).

<sup>15</sup> *Id.*

<sup>16</sup> *Compare Intercont’l Dictionary Series v. DeGruyter*, 822 F. Supp. 662 (C.D. Cal. 1993) (holding that Australian university was organ of foreign state), with *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374 (E.D. Pa. 1997) (holding that English medical

passing over it without significant discussion (if they even mention it). Some note simply that Congress provided “organ” as an alternative to fill the gaps left by other parts of the definition of “agency or instrumentality.”<sup>17</sup> The lengthiest discussions simply reformulate and reorganize the existing doctrines without providing any comprehensive review.<sup>18</sup>

This Article will demonstrate why the courts’ current approaches fail on a number of grounds. First, they do not consider the broader question of what characteristics should identify an organ. The factors established by the first courts to determine organ status were just descriptions of the relevant characteristics of the entities then before those courts.<sup>19</sup> The next set of courts generalized from the specific characteristics that the first courts had mentioned and created a balancing organ test for general application.<sup>20</sup> Those simplifications became the norms for determining organ status.<sup>21</sup> This lack of any coherent foundation contributes to the contrary results that courts have reached on the organ question.

Second, these inquiries have an improper focus. In attempting to define what Congress left undefined, courts must look to congressional intent. Congress’s two chief goals in enacting the FSIA were to reduce the interference with the conduct of foreign relations caused by litigation in United States courts against foreign sovereigns and to delegate foreign sovereign immunity decisions to the judicial branch. Congress intended both to depoliticize those decisions and to provide uniformity and predictability in judgment.<sup>22</sup> More specifically, the term “organ” is embedded in the definition of an agency or instrumentality of a foreign state and the legislative history shows that Congress intended it to cover a wide variety of entities,

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and dental schools were not organs). For additional commentary see *infra* notes 143-53 and accompanying text.

<sup>17</sup> See Working Group of the Am. Bar Ass’n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 516 (2002) [hereinafter ABA Report].

<sup>18</sup> See Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 GA. L. REV. 1121, 1173-80 (1997); Abigail H. Wen, Note, *Suing the Sovereign’s Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1578-87 (2003) (arguing that statutory amendment is required to address many private actors’ ties to foreign states and concurrent effects on foreign relations).

<sup>19</sup> See *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996); *Intercont’l Dictionary Series*, 822 F. Supp. at 673.

<sup>20</sup> See *infra* notes 87-103 and accompanying text.

<sup>21</sup> See *Supra Med. Corp.*, 955 F. Supp. at 379.

<sup>22</sup> See H. R. REP. NO. 94-1487, at 6-7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604-06.

ranging from central banks to mining and shipping enterprises.<sup>23</sup> While the legislative history is silent about the extent and character of the ties between the entity and the government that Congress believed would have been sufficient to address its foreign relations concerns, inquiries based solely on either control or the public nature of the entity's principal activity fail to address Congress's intent; a broader examination into the entity-state relationship is required.

Third, this Article will show that courts have ignored the implications of the important procedural protections that the FSIA extends to foreign states and their agencies and instrumentalities. Congress intended each of these protections<sup>24</sup> to limit the potential annoyance to the foreign sovereign.<sup>25</sup> For example, the statute's broad grant of federal jurisdiction and absolute right to removal regardless of the nature of the claims or the consent of other defendants avoids local bias, whether real or imagined, in suits against foreign states.<sup>26</sup> Similarly, the requirement of a bench trial allows for and addresses foreign states' unfamiliarity and discomfort with and mistrust of the civil jury.<sup>27</sup>

Finally, it is crucial to understand that the FSIA's procedural protections apply *regardless* of a court's ultimate decision on immunity.<sup>28</sup> Once the court makes the threshold decision that a foreign state or one of its agencies or instrumentalities is present, the designated procedural protections take effect.<sup>29</sup> The court then considers whether an exception to the presumption of immunity applies.<sup>30</sup> Indeed, many entities that would qualify as organs under my proposal would be largely commercial entities and, therefore, not

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<sup>23</sup> See *id.* at 15-16.

<sup>24</sup> See generally JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 267, 295, 639-710 (2d ed. 2003) (discussing procedural protections under FSIA); Kane, *supra* note 4 (same).

<sup>25</sup> See DELLAPENNA, *supra* note 24, at 12-13, 25, 30, 32, 33, 44.

<sup>26</sup> 28 U.S.C. § 1441(d) (2000 & Supp. II 2002) ("Any civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."); see Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 73 (2001); Kane, *supra* note 4, at 393-94.

<sup>27</sup> 28 U.S.C. § 1330(a) (2000); *id.* § 1441(d) (2000 & Supp. II 2002); see *Rex v. Cia. Pervana de Vapores S.A.*, 660 F.2d 61, 64 (3d Cir. 1981); Dellapenna, *supra* note 26, at 74; Kane, *supra* note 4, at 421-24.

<sup>28</sup> See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983).

<sup>29</sup> See *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999).

<sup>30</sup> See *Verlinden*, 461 U.S. at 489; *Byrd*, 182 F.3d at 388.

entitled to immunity for the majority of their activities, due to the FSIA’s commercial activity exception.<sup>31</sup> The separation of procedural protections from immunity emphasizes Congress’s concern with the effect of lawsuits on foreign relations.

My proposal seeks to remedy these failures. It addresses the purpose and structure of the FSIA and their effect on the definition of “organ.” In so doing, my proposal draws analogies from conceptually-related areas of the law that the courts have largely ignored: the “arm of the state” doctrine in the context of Eleventh Amendment immunity and “alter ego” veil piercing. The arm of the state doctrine allows an entity with a sufficiently tight relationship to the state to use the state’s Eleventh Amendment immunity if it serves the twin purposes of the Eleventh Amendment: preserving state dignity and treasuries from federal courts.<sup>32</sup> Alter ego veil piercing ignores the legal separation between a corporation and its shareholders or parent corporation, passing on the subsidiary’s debt to the parent if the parent exercised sufficient control such that the two entities might be considered the same entity.<sup>33</sup> While the analogies are not perfect, both of these doctrines perform the same conceptual function as that of the “organ of a foreign state” within the FSIA’s structure; they ignore the legal separateness of an entity and its parent corporation or state and pass on certain legal rights and responsibilities.

I submit that the proper method to address Congress’s intended definition of “organ” is to focus on the possibility of interference with the conduct of American foreign relations with another sovereign that might result from a court’s decision not to classify an entity with a significant relationship to the sovereign as an organ thereof.<sup>34</sup> This risk of interference must stem from objectively reasonable behavior on the part of the foreign state; that is, the sovereign must be justifiably affronted. The sovereign’s justifiable affront, moreover, must derive only from the court’s decision not to assign organ status to the entity in question, thereby refusing to treat that entity as part of the sovereign, and not from the existence, maintenance, or conduct of the litigation.

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<sup>31</sup> See 28 U.S.C.A. § 1605(a)(3) (2008).

<sup>32</sup> See Hector G. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 840-41 (2007); Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1262-64 (1992).

<sup>33</sup> See *Culbreth v. Amosa, Ltd.*, 898 F.2d 13, 15 (3d Cir. 1990).

<sup>34</sup> For a discussion of the nature and extent of the relationship that qualify as sufficiently significant, see Section IIIB *infra*.

Two examples illustrate why the affront must be justifiable and why it must originate with the failure of a U.S. court to afford the entity sovereign treatment. China is, no doubt, affronted by every exercise of jurisdiction by U.S. courts in any context. But it cannot be that Congress intended that every Chinese entity, no matter how attenuated its connection to the government, would be considered a Chinese organ thereof.<sup>35</sup> Had Congress envisioned such a result, it could have extended the FSIA in that manner; but nothing in the statute's text, history, or structure indicates any such desire.<sup>36</sup> In addition to reducing unneeded tension with foreign states, Congress intended the FSIA to depoliticize immunity and immunity-related decisions by transferring them from the executive to the judiciary; requiring an inquiry into, and litigation about, the subjective effect of the organ decision on a foreign government would not further that intent.

A second example is that of a "national champion" company. Germany might conceivably take offense at Siemens's involvement in a U.S. lawsuit; it has been a longstanding cornerstone of the German economy and any significant litigation risks or judgments would likely have detrimental effects thereon. However, even if the German government felt that subjective offense, it should not be considered "justifiable affront" because Germany could not reasonably expect sovereign protections to be extended to a completely independent and private entity, regardless of its historic, economic, or cultural value, unless significant indicia of ties to the government were present.

Our understanding of justifiable affront, and courts' application of it, can be fleshed out by capturing the relevant pieces of the existing organ tests and adapting the arm of the state and alter ego inquiries. From these sources, I propose a sequence of five questions to ascertain whether a foreign state would be justifiably affronted by a court's failure to afford sovereign status to an entity. This structured analysis examines the wide variety of possible ties to the state, including structural, economic, operational, and financial relationships.

The five questions that I propose a court should ask are as follows: First, has the foreign state ceded any of its core and traditional sovereign powers to the entity? Second, are there sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury? Third, how does the foreign

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<sup>35</sup> Cf. *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1977) (noting that Yugoslavia's socialist policy of states being deemed "owner" of all property in Yugoslavia cannot confer organ status on otherwise independent entity).

<sup>36</sup> See notes 51-76 and accompanying text.



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state treat the entity under local law and is that treatment significantly different from its treatment of other similar entities? Fourth, do U.S. courts give agency or instrumentality status to similar entities in the United States and other foreign states? Finally, does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it exercise such extreme control?

In any given context, each question cannot, by itself, resolve the entity’s putative entitlement to organ status. However, if the answer to a given question strongly supports organ status, that characteristic of the entity-state relationship indicates that the failure to extend FSIA protections to the entity would likely affront a reasonable foreign government. The court should, therefore, consider the entity an organ of that state. For example, if the foreign government has decided to privatize its telecom industry, but has guaranteed the resulting entity’s performance under certain long-term contracts to encourage foreign investment, the government would be justifiably affronted by the failure to treat that entity as an organ of the state. These questions should not be applied mechanically, balancing three that support organ status against two that do not, for example. The process of asking and answering these five questions draws a picture of the entity-state relationship that the courts should use to assess the potential for justifiable affront.

We can further clarify the picture of the entity-state relationship with two important comparative inquiries. The foreign state-entity relationship can be compared to the relationships between that same government and other similar entities and it can be compared to relationships between other similar entities in different foreign states and their respective governments. The domestic comparison will reveal whether the government treats the entity in a notably different manner from other similar entities. If the government has a different relationship with the entity in question (e.g., a particular insurance company) than with other similar entities, and those entities are undeniably private (the rest of the insurance market), denying that entity the benefits of the FSIA has a greater risk of justifiable affront. Conversely, if the government treats them differently, but the other entities are themselves organs of the foreign state, there would be little risk of justifiable affront.

The international comparison posits that courts can infer the likelihood of justifiable affront from the manner in which other foreign states treat the type of entity in question. If one state treats its power company as an organ (i.e., would be justifiably affronted by the failure to extend sovereign protections), the same is likely true for another foreign state. This comparative analysis also avoids the

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potential problem of disparate treatment by U.S. courts between otherwise similar entities of two foreign sovereigns. The fact that U.S. court afforded a Mexican petroleum company the protections of the Mexican state, but denied those same protections to a Brazilian petroleum company might understandably upset Brazil and significantly interfere with the United States' relationship therewith.<sup>37</sup>

This focus on justifiable affront has significant advantages. Most importantly, it addresses congressional intent to avoid unnecessary interference with the conduct of foreign relations. It approaches the organ question in different manners and from different angles to achieve the necessary flexibility and breadth intended by Congress.<sup>38</sup> It will be equally effective at analyzing institutions established by socialist governments in the past century as democratic PPPs in the next. It also ensures as much uniformity as possible not only by explicitly requiring a comparative analysis across countries, but also by providing a structured framework.

I begin Part I with a brief history of and an investigation into the structure and purposes of the FSIA. I then critique both current organ tests by looking at the history of their development, how courts apply them, and at how well they serve the purposes of the FSIA. Part II briefly summarizes the two doctrinal sources that I apply to the organ inquiry: the arm of the state inquiry under the Eleventh Amendment and alter ego veil piercing. In Part III, I lay out my proposal for determining whether an entity is an organ of a foreign state. I first explain the importance of considering the relationship between the entity and the foreign state in its entirety to best achieve Congress's goal of avoiding justifiable affront. I then discuss the extent to which the arm of the state and alter ego doctrines are applicable to an organ of a foreign state. I conclude by fleshing out my proposal for the framework that should replace the current rubric.

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<sup>37</sup> Cf. *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2424-26 (2007) (noting that similarity between Powerex and both domestic and foreign power companies supported Powerex's being considered organ).

<sup>38</sup> See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1319 (S.D. Tex. 1994).

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 AND THE  
DEFINITION OF “ORGAN”

A. *An Overview of the FSIA*

Foreign sovereign immunity enjoys a long and well-documented history in the United States.<sup>39</sup> Beginning with its first incarnation in *The Schooner Exchange v. M’Faddon*<sup>40</sup> in 1812 until the Tate Letter in 1952,<sup>41</sup> foreign sovereigns enjoyed “virtually absolute immunity” in U.S. courts.<sup>42</sup> The Tate Letter represented a watershed in foreign sovereign immunity in the United States. With its adoption of the theory of “restrictive immunity,”<sup>43</sup> foreign sovereigns would benefit from immunity only for their “public acts” and not for their “commercial” ones.<sup>44</sup>

The application of the Tate Letter was problematic, however. The Executive Branch, rather than the courts, decided when to grant sovereign immunity.<sup>45</sup> Generally, the State Department would make a “suggestion of immunity,” which the courts would almost universally follow.<sup>46</sup> However, the State Department often did not make an objective decision; foreign sovereigns would exert political pressure, which would lead to suggestions of immunity for acts that did not pass muster under the restrictive theory.<sup>47</sup> Additionally, when the State Department did not express an opinion, the courts had to determine

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<sup>39</sup> See *Republic of Austria v. Altmann*, 541 U.S. 677, 688-92 (2004); GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 219-33 (4th ed. 2007).

<sup>40</sup> *Schooner Exchange v. M’Fadden*, 11 U.S. (1 Cranch) 116, 145-47 (1812).

<sup>41</sup> Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney Gen. Philip B. Perlman (May 19, 1952), in *DEPT. ST. BULL.*, May 1952, at 984-85, and *Alfred Dunhill of London, Inc., v. Cuba*, 425 U.S. 682, 711-15 (1976) (App. 2 to opinion of White, J.).

<sup>42</sup> See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-87 (1983).

<sup>43</sup> For a discussion of the history of the genesis and the theory of restrictive immunity, see Michael Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 *HARV. INT’L L. J.* 1, 4-17 (1985).

<sup>44</sup> The Tate Letter and the American adoption of restrictive immunity were prompted by the entry of government agencies into the global marketplace. See Feldman, *supra* note 10, at 303.

<sup>45</sup> See Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 *COLUM. J. TRANSNAT’L L.* 33, 39-43 (1978).

<sup>46</sup> See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”); see also Feldman, *supra* note 10, at 304.

<sup>47</sup> See *Verlinden*, 461 U.S. at 487.

whether to grant immunity in any given instance, guided only by past State Department “suggestions.”<sup>48</sup> The morass that resulted from multiple branches of the government participating in the immunity decision, the political considerations involved, and the lack of uniform standards condemned the Tate Letter to an early grave.<sup>49</sup> It was against this backdrop that Congress enacted the FSIA in 1976.<sup>50</sup>

Congress stated the FSIA’s purposes succinctly: “to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.”<sup>51</sup> The FSIA codified the theory of restrictive immunity into a comprehensive jurisdictional and procedural scheme that “provide[d] when and how parties c[ould] maintain a lawsuit against a foreign state or its entities in the courts of the United States and [provided] when a foreign state [was] entitled to immunity.”<sup>52</sup> Unsurprisingly, Congress’s principal purpose of avoiding offense to foreign states and the procedures established by the FSIA (the “when and how”) for suits against a foreign state are closely linked; in fact, the desire to avoid friction pervades the procedural protections afforded foreign states.<sup>53</sup>

First and foremost, the FSIA applies not only to the foreign state *qua* state, but also to any agency or instrumentality of that state.<sup>54</sup> Congress recognized that, in the modern world, sovereigns delegate some of their core functions to subsidiary entities for a variety of reasons; the reasonable sovereign would be no less affronted by suits against those entities than against the sovereign itself.<sup>55</sup>

Next, the FSIA provides jurisdiction in federal court without regard to the amount in controversy<sup>56</sup> and an absolute right to remove the

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 488 (“Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied.”).

<sup>50</sup> See generally von Mehren, *supra* note 45, at 43-48 (discussing circumstances of FSIA’s passage by Congress).

<sup>51</sup> H. R. REP. NO. 94-1487, at 44 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6634.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 44-45.

<sup>54</sup> See 28 U.S.C. § 1603 (2000 & Supp. V 2005).

<sup>55</sup> Indeed, some courts and commentators consider entities that exercise core functions part of the foreign state itself. See *Transaero v. La Fuerza Area Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994); ABA Report, *supra* note 17, at 509-11.

<sup>56</sup> 28 U.S.C. § 1330(a) (2000); H. R. REP. NO. 94-1487, at 13.

entire action from state court,<sup>57</sup> regardless of the consent of co-defendants.<sup>58</sup> Federal jurisdiction encourages uniformity in decision and avoids local bias, thereby avoiding the possibility of disparate treatment, which might negatively affect the relationship with the slighted government.<sup>59</sup> These grants emphasize Congress’s preoccupation with foreign relations with regard to the FSIA.

Similarly, all trials under the FSIA are bench trials, regardless of the nature of the claim and any right to a jury trial thereunder.<sup>60</sup> In addition to intending to avoid local bias yet again, Congress recognized that most foreign sovereigns are unfamiliar with the common law system and our tradition of the civil jury. Thus, Congress intended to avoid any friction or lack of faith in the proceedings that such a trial might cause.

Finally, the FSIA provides restrictions on the pre-judgment attachment of foreign state assets,<sup>61</sup> and the post-judgment procedures for satisfying a judgment,<sup>62</sup> as well as particularized service<sup>63</sup> and venue<sup>64</sup> requirements, among other things.<sup>65</sup> Congress intended all of

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<sup>57</sup> 28 U.S.C. §1441(d) (2000 & Supp. II 2002) (“Any civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.”); see *Suter v. Munich Reins. Co.*, 223 F.3d 150, 157 (3d Cir. 2000); see also *Dellapenna*, *supra* note 26, at 73; *Kane*, *supra* note 4, at 394.

<sup>58</sup> See *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir. 1980); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 581-82 (E.D. Pa. 1985); H. R. REP. NO. 94-1487, at 32.

<sup>59</sup> H. R. REP. NO. 94-1487, at 13 (“[D]isparate treatment may have adverse foreign relations consequences.”).

<sup>60</sup> See 28 U.S.C. § 1330(a) (“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . .”); *id.* § 1441(d) (“Upon removal the action shall be tried by the court without jury.”); *Rex v. Cia. Pervana de Vapores S.A.*, 660 F.2d 61, 64 (3d Cir. 1981). There is no conflict between the FSIA’s provision for bench trials for suits against foreign sovereigns and the Seventh Amendment. See *Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 878-81 (2d Cir. 1981). Courts have uniformly held that suits at common law did not include the right to sue a sovereign. *Id.*

<sup>61</sup> 28 U.S.C.A. § 1610(d) (2008) (requiring waiver from foreign state for pre-judgment attachment of its property).

<sup>62</sup> See *id.* § 1610(a) (governing property of foreign state itself), (b) (governing property of agency or instrumentality of foreign state); *id.* § 1611 (2000). See generally Marc C. Del Bianco, *Execution and Attachment Under the Foreign Sovereign Immunities Act of 1976*, 5 YALE J. WORLD PUB. ORD. 109 (1978) (discussing FSIA attachment procedures).

<sup>63</sup> 28 U.S.C. § 1608 (2000); *DELLAPENNA*, *supra* note 24, ch. 4; *Dellapenna*, *supra* note 26, at 71.

<sup>64</sup> 28 U.S.C. § 1391(f) (2000 & Supp. II 2002); *Kane*, *supra* note 4, at 410-12.

<sup>65</sup> While the right of removal is available equally to foreign states and their

these procedural protections to make it difficult to sue foreign states in U.S. courts and to minimize further any possibility of friction that those suits might cause.<sup>66</sup>

These procedural protections apply to a foreign state and any agency or instrumentality, even if a court does not grant immunity.<sup>67</sup> Indeed, the FSIA only grants presumptive immunity; a plaintiff can rebut that presumption by establishing that one of the various exceptions to immunity exists.<sup>68</sup> If the plaintiff succeeds, there is federal subject matter jurisdiction over the plaintiff's claims and those claims continue in federal court subject to the FSIA's procedural protections.<sup>69</sup> If the plaintiff fails, the state or entity is immune and the case is dismissed.<sup>70</sup> The fact that Congress decided to allow foreign states and their agencies and instrumentalities to retain the procedural protections in cases where immunity is not appropriate further emphasizes Congress's goal of minimizing the potential annoyance of litigation to foreign sovereigns.

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agencies and instrumentalities, the restrictions on attachment, the service and the venue requirements differ based on whether it is the state itself or one of its entities. See BORN, *supra* note 39, ch. 3; Dellapenna, *supra* note 63, at 66. For a discussion of many of the procedural issues raised by the FSIA, see generally Kane, *supra* note 4.

<sup>66</sup> See USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 207 (3d Cir. 2003).

<sup>67</sup> See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 465 (1983); ABA Report, *supra* note 17, at 506.

<sup>68</sup> See Dellapenna, *supra* note 26, at 68. The FSIA also changed the application of personal jurisdiction over foreign states and their agencies and instrumentalities. See 28 U.S.C. § 1330(b) (2000); H. R. REP. NO. 94-1487, at 13-14 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6611-12. Under the FSIA, subject matter jurisdiction (i.e., an exception from immunity) equals personal jurisdiction; a plaintiff need not inquire into the contacts that a defendant might have with the forum. *Id.* Thus, plaintiffs sometimes have an interest in arguing that a defendant is a foreign state, subject to the FSIA though not immune, where it is otherwise difficult, or impossible, to obtain personal jurisdiction over the defendant. See Dellapenna, *supra* note 26, at 68-70. Aside from the statutory implications, it remains unclear whether foreign states are constitutional "persons" entitled to the due process rights established in *International Shoe* and its progeny. See *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002).

<sup>69</sup> FSIA cases can also proceed in state court, as the grant of jurisdiction is not exclusive. See H. R. REP. NO. 94-1487, at 13-14.; Kane, *supra* note 4, at 388. However, the vast majority of FSIA cases are litigated in the federal courts.

<sup>70</sup> The case is dismissed for lack of subject matter jurisdiction. This does not, however, mean that the case gets remanded to state court as it would with most other dismissals under Federal Rule of Civil Procedure 12(b)(1). A dismissal for lack of subject matter jurisdiction because of FSIA immunity ends the action entirely and is entitled to collateral estoppel effect. See *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 767 (9th Cir. 2007).

It also reveals the intentional balance that Congress struck in the FSIA. Congress had to weigh the potential for interference with foreign relations against the expectations of private parties that may have contracted with a foreign entity without knowledge of that entity’s connection to a foreign state.<sup>71</sup> The result was that any lawsuit against a foreign state or one of its organs would proceed in federal court with various procedural protections designed to minimize the impact of the lawsuit on the conduct of foreign relations. The federal judge would then determine whether to grant immunity or if one of the exceptions to immunity applied.<sup>72</sup> Because the relationship of the affected private parties to the entity would most often be commercial, there would be no immunity due to the commercial activity exception.<sup>73</sup> The aggrieved plaintiff could then proceed with its lawsuit, suffering only the harms caused by the various other protections of the FSIA. Even though the possibly misled counterparty would, no doubt, usually prefer a jury trial in state court, Congress’s balance preserves the plaintiff’s right to proceed against the foreign government or agency. The plaintiff simply must exercise this right in the manner that Congress has deemed least likely to interfere with the conduct of foreign relations.

Aside from its influence on procedural protections, congressional purpose must play and indeed has played a role in courts’ interpretation of the FSIA’s other terms.<sup>74</sup> For this reason, courts have interpreted “agency or instrumentality” broadly.<sup>75</sup> In other contexts, courts have held that the FSIA provides immunity from suit, not just from liability, which entitles a foreign sovereign to interlocutory review of any denial of immunity.<sup>76</sup> Not only have the courts granted an immediate appeal of any denial of immunity, but they also often stay discovery and other pre-trial procedures pending the resolution of

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<sup>71</sup> See *USX Corp.*, 345 F.3d at 208.

<sup>72</sup> See 28 U.S.C. § 1604 (2000).

<sup>73</sup> See 28 U.S.C.A. § 1605(a)(2) (2008). Other exceptions include waiver, takings in violation of international law, and certain tortious acts. See *id.*

<sup>74</sup> See *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (looking to congressional purpose to determine tax lien was immovable right to property).

<sup>75</sup> See *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 940 (7th Cir. 1996) (analyzing text of FSIA (and legislative history) to conclude that Congress intended foreign state and agency or instrumentality to be ample concepts).

<sup>76</sup> See *Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 & n.2 (7th Cir. 1989); *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987).

the immunity appeal to minimize the potential for interference with foreign relations.

*B. The Structure of the FSIA and the Organ Prong of §1603 (b)*

The FSIA applies whenever one of the parties qualifies as a foreign state.<sup>77</sup> The definition of “foreign state” is, like much of the FSIA, opaque — a foreign state includes “a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).”<sup>78</sup> An agency or instrumentality of a foreign state is, in turn, defined under subsection (b) as

any entity:

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USC § 1332(c) and (e)] nor created under the laws of any third country.<sup>79</sup>

Almost all litigation about whether an entity meets the threshold criteria of “foreign state” revolves around § 1603(b)(2).<sup>80</sup> Until the Supreme Court’s decision in *Dole v. Patrickson*, most entities sought to qualify under the ownership requirements of § 1603(b)(2), which were easy to show, rather than under the term “organ”, which

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<sup>77</sup> See *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999).

<sup>78</sup> Except for the service provisions where an agency or instrumentality is not included. See 28 U.S.C. § 1603(a) (2000 & Supp. V 2005).

<sup>79</sup> *Id.* § 1603(b).

<sup>80</sup> There is some litigation about § 1603(b)(1) and (3), see, e.g., *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 655 (D. Tenn. 1998) (litigating § 1603(b)(1)); *Gardiner Stone Hunter Int’l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125, 129 (S.D.N.Y. 1995) (litigating § 1603(b)(2)-(3)), but there is usually little litigation about what is the foreign state qua state and most opposing parties concede the legal separateness and citizenship / legal creation prongs of the agency or instrumentality test, see *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 211 n.11 (D. Del. 2007).



Congress left undefined.<sup>81</sup> *Dole*, however, prohibited the consideration of “tiered” ownership, meaning that only an entity whose equity was held directly by the state itself was an agency or instrumentality under the ownership requirements.<sup>82</sup> Because many entities were subsidiaries of agencies or instrumentalities, rather than direct subsidiaries of the state, they were forced to rely on the organ portion of § 1603(b)(2) to make use of the FSIA.

The organ portion of § 1603(b)(2) is integral to the FSIA, despite its having languished in obscurity for much of its early history.<sup>83</sup> Only with a definition of “organ” that fills in the gaps among the agencies and instrumentalities that a foreign government owns directly can § 1603(b)(2) properly reflect the congressional belief that federal foreign relations interests would be best served by avoiding state courts.<sup>84</sup> The legislative history of the FSIA reveals that Congress intended courts to interpret “agency or instrumentality” broadly to encompass a diverse variety of institutions, ranging from central banks to natural resources companies and procurement agencies.<sup>85</sup>

Because “organ” is the only term in the definition of “agency or instrumentality” subject to interpretation, especially in light of *Dole*, the term must be flexible enough to encompass the breadth of organizations and governmental systems Congress meant to cover.<sup>86</sup>

### 1. The Early Cases

The first cases that required interpretation of “organ” did not give much thought to its scope or broader application. Some punted entirely, noting without discussion that the entity in question was an

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<sup>81</sup> See *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845 (5th Cir. 2000).

<sup>82</sup> See *Patrickson v. Dole Food Co.*, 538 U.S. 468, 480 (2003).

<sup>83</sup> Before 1990, there were only five cases that even used the organ prong, let alone discussed its more general application. See *infra* note 87. By contrast, more than thirty cases have been litigated based on the ownership prong since 2003.

<sup>84</sup> See *Fid. & Cas. Co. v. Tex. E. Transmission Corp.* (*In re Tex. E. Transmission Corp.*), 15 F.3d 1230, 1239 (3d Cir. 1994) (“[T]he Supreme Court has acknowledged Congress’ deliberate intent to circumvent much of the potential for interference with the federal government’s foreign relations caused by lack of uniformity and local bias in civil caselaw involving foreign states as defendants by channeling private actions against foreign sovereigns away from state forums and into federal courts.”).

<sup>85</sup> See H. R. REP. NO. 94-1487, at 15-16 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6613-14.

<sup>86</sup> See *Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214, 1998 U.S. Dist. LEXIS 1912, at \*11 (S.D.N.Y. Feb. 20, 1998) (noting flexible nature of organ test); H. R. REP. NO. 94-1487, at 15-16.

organ of the foreign state.<sup>87</sup> Others considered whether the entity was a proper agency or instrumentality of a foreign state, without considering the specific characteristics of an organ or its ownership structure.<sup>88</sup>

*Yessenin-Volpin v. Novosti Press Agency* demonstrates the difficulty that courts initially encountered when applying § 1603(b).<sup>89</sup> In *Yessenin-Volpin*, defendants TASS Agency (“TASS”)<sup>90</sup> and Novosti Press Agency (“Novosti”) argued that they were entitled to immunity under the FSIA.<sup>91</sup> Regarding TASS, the court relied on an affidavit of the Soviet ambassador to the United States stating that TASS was “the organ of the Soviet State” to hold that TASS came within the definition of “foreign state.”<sup>92</sup> Novosti presented a more difficult question.<sup>93</sup> After quoting the statutory language, the court noted that the definition in § 1603(b)(2) “seem[ed] designed to establish the degree of the foreign state’s identification with the entity under consideration,” but complained that it was “ill-suited to concepts which exist in socialist states such as the Soviet Union.”<sup>94</sup> The court continued with a lengthy discussion of the oversight that the Soviet government exercised,<sup>95</sup> the stated purposes of Novosti,<sup>96</sup> the financial

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<sup>87</sup> See *Tifa, Ltd. v. Ghana*, No. 88-1513, 1991 U.S. Dist. LEXIS 11855, at \*21 (D.D.C. Aug. 27, 1991); *Nat’l Expositions, Inc. v. Du Bois*, 605 F. Supp. 1206, 1211 n.18 (D. Pa. 1985); *Mueller v. Diggelman*, No. 82 Civ. 5513, 1983 U.S. Dist. LEXIS 16970, at \*6 (D.N.Y. May 13, 1983); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978).

<sup>88</sup> See *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir. 1983); *Jet Line Servs., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1172 (D. Md. 1978).

<sup>89</sup> *Yessenin-Volpin*, 443 F. Supp. at 852.

<sup>90</sup> The full name of TASS is the “Telegraph Agency of the Soviet Union of the USSR Council of Ministers.” *Id.* at 851.

<sup>91</sup> *Id.*

<sup>92</sup> And apparently the plaintiff agreed, as he conceded the point. *Id.* Regardless, the court appears to have concluded independently that TASS was immune to its jurisdiction and does not rely exclusively on defendant’s admission. Indeed, since the issue of sovereign immunity goes to the court’s subject matter jurisdiction, the court must make an independent examination because a defendant’s admission on the issue can in no way relieve the court of its duty to determine whether it has subject matter jurisdiction. *Mueller*, 1983 U.S. Dist. LEXIS 16970, at \*6 n.8.

<sup>93</sup> The plaintiff conceded that Novosti was a separate entity and that it was neither a citizen of the United States nor organized under the laws of a third country, see 28 U.S.C. § 1603(b)(1), (3) (2000 & Supp. V 2005), so only its organ or ownership status remained at issue. See *Yessenin-Volpin*, 443 F. Supp. at 852.

<sup>94</sup> *Yessenin-Volpin*, 443 F. Supp. at 852.

<sup>95</sup> *Id.* at 852-53.

<sup>96</sup> *Id.* at 852.

support that the government provided,<sup>97</sup> and the level of financial and operational independence that Novosti enjoyed.<sup>98</sup>

While this would seem, at first glance, to be an attempt at defining “organ,”<sup>99</sup> the court examined these characteristics of Novosti only to measure the Soviet state’s ownership interest therein.<sup>100</sup> It then concluded that Novosti was an instrumentality of the Soviet state and, therefore, was entitled to be treated as a foreign state under the FSIA.<sup>101</sup> The court analyzed TASS and Novosti differently because the ambassador, in his affidavit, characterized TASS, but not Novosti, as an organ.<sup>102</sup> This reveals the confusion for courts created by the layered definitions of “foreign state” and “agency or instrumentality of a foreign state” within § 1603, and Congress’s failure to define “organ.” It also demonstrates the institutional reluctance of courts to interfere with a foreign sovereign’s characterization of one of its own entities.

*Yessenin-Volpin* and other similar cases<sup>103</sup> reveal that the first courts to consider Congress’s lapse did not closely investigate the statutory language of § 1603(b) to determine agency or instrumentality status. Rather, they looked at the circumstances presented to them, and either compared them to the legislative history or to their own standards of what might constitute an agency or instrumentality of a foreign state.<sup>104</sup> They never extracted generalized conclusions about the

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 852-54.

<sup>99</sup> And as we will see, *infra* Section III.B, these are relevant considerations.

<sup>100</sup> See *Yessenin-Volpin*, 443 F. Supp. at 854.

<sup>101</sup> The court eventually concluded that none of the exceptions applied so TASS and Novosti were immune and it lacked jurisdiction over the matter. *Id.* at 856-57.

<sup>102</sup> Compare *id.* at 852 (discussing TASS), with *id.* at 854 (discussing Novosti).

<sup>103</sup> The other cases from the year shortly after the passage of the FSIA do not discuss, in any depth, the requirements of § 1603(b)(2). *Jet Line Services, Inc. v. MV Marsa El Hariga*, 462 F. Supp. 1165, 1172 (D. Md. 1978), also relies upon affidavits of embassy officials to hold that a ship was a Libyan organ in an *in rem* action without further discussion. *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 416 (2d Cir. 1983), assigned agency and instrumentality status to a Romanian bank that was “but a cat’s paw of the Romanian government” based largely on affidavits attesting to ownership and “its position as a state foreign trade organ.” *Id.* at 414. The court did not consider, however, what characteristics might render an entity an organ beyond a statement that it “serves the foreign trade goals of the state.” *Id.* Finally, *National Expositions, Inc. v. Du Bois*, 605 F. Supp. 1206, 1211 (D. Pa. 1985), and *Mueller v. Diggelman*, No. 82 Civ. 5513, 1983 U.S. Dist. LEXIS 16970, at \*1 (D.N.Y. May 13, 1983), simply assigned organ status to the Venezuelan National Institute of Ports and a Swiss court, respectively, without notable discussion.

<sup>104</sup> See *supra* notes 87-103 and accompanying text.

nature of agencies or instrumentalities or organs from those facts. Nor did they focus on the language of §1603(b), or on defining “organ.”

## 2. The Current Confused State of the Law

The next set of cases to confront entities claiming to be organs of foreign states laid the groundwork for the current state of the law. Those cases, *Intercontinental Dictionary Series v. DeGruyter*,<sup>105</sup> *Gates v. Victor Fine Foods*,<sup>106</sup> and *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect (Corporacion Mexicana)*,<sup>107</sup> suffered from a similar flaw to the cases that came before them. While they were the first to separate out the definition of “organ” from the ownership requirements of § 1603(b)(2), the courts followed the examples of the early cases and looked only at the relevant characteristics of the entities before them. They never considered the broader question of the appropriate general characteristics of organs. That might not have been a problem, except that subsequent cases looked to these earlier courts’ recitation of the factors upon which they based their decisions to make more universal assertions about the nature of organs of foreign states.<sup>108</sup>

### a. The Balancing Factors

Most courts today follow some sort of balancing test to determine whether an entity is an organ of a foreign state.<sup>109</sup> The factors in this balancing test derive principally from two cases: *Intercontinental Dictionary Series* and *Corporacion Mexicana*. The courts in these cases isolated the specific characteristics of the entities before them that supported their status as organs, and thereby agencies or instrumentalities, of a foreign state.<sup>110</sup> The balancing test that courts currently apply was born from those characteristics that the courts decided to highlight.<sup>111</sup>

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<sup>105</sup> *Intercont’l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 662 (C.D. Cal. 1993).

<sup>106</sup> *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1457 (9th Cir. 1995).

<sup>107</sup> *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 650 (9th Cir. 1996).

<sup>108</sup> *See Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997).

<sup>109</sup> *See Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 280 (5th Cir. 2007); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999), *withdrawn on other grounds sub nom. Alpha Therapeutic Corp. v. Kyokai*, 237 F.3d 1007 (9th Cir. 2001).

<sup>110</sup> *See infra* notes 112-21 and accompanying text.

<sup>111</sup> *See Supra Med. Corp.*, 955 F. Supp. at 379.

In *Intercontinental Dictionary Series*, the court considered whether a plaintiff could sue the Australian National University (“ANU”) for copyright infringement regarding the development of a linguistic dictionary.<sup>112</sup> The court looked at the evidence presented by the ANU and concluded that the ANU was an organ of the Australian government because of the following characteristics:

the ANU [was] formed by the Australian government to further academic interests of national importance; the salaries of its employees (including the named individual Australian defendants) [were] paid by the Australian government; the ANU [submitted] Annual Reports and [was] subject to funding by the Australian government; and the ANU [was] treated as [an] ‘agenc[y]’ in other legislation. Despite their relative academic independence, the ANU defendants should be considered “organs” of the Australian government.<sup>113</sup>

Interestingly, the court also found that the considerations that determine Eleventh Amendment immunity are analogous to those for FSIA agency or instrumentality status.<sup>114</sup> Therefore, the fact that California’s public universities are entitled to state immunity supports the conclusion that the ANU should be entitled to Australia’s FSIA immunity.<sup>115</sup> This reference to the Eleventh Amendment was ignored by later cases, even though those cases based their tests on *Intercontinental Dictionary Series*.<sup>116</sup>

*Corporacion Mexicana* considered whether the FSIA applied to the refining subsidiary of PEMEX, the Mexican oil and gas company (itself an agency or instrumentality of the Mexican state).<sup>117</sup> The court first considered whether being the majority-owned subsidiary of an agency or instrumentality was the same as being that of the state itself (i.e., the question of tiering sovereign ownership interests).<sup>118</sup> Citing its previous holding in *Gates*, the court held that tiering was inappropriate, which left PEMEX-Refining with only the organ prong

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<sup>112</sup> *Intercont’l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 673-74.

<sup>115</sup> *Id.*

<sup>116</sup> See *infra* notes 123-26 and accompanying text.

<sup>117</sup> *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 652 (9th Cir. 1996).

<sup>118</sup> *Id.* at 654.

upon which to rely for FSIA protection.<sup>119</sup> In a description strikingly similar to that in *Intercontinental Dictionary Series*, the court noted that PEMEX-Refining was:

an integral part of the United Mexican States[; it] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it [wa]s entirely owned by the Mexican Government; [it wa]s controlled entirely by government appointees; [it] employ[ed] only public servants; and [wa]s charged with the exclusive responsibility of refining and distributing Mexican government property.<sup>120</sup>

This description of PEMEX-Refining was quoted from the district court's opinion and unopposed by plaintiffs; according to the Ninth Circuit Court of Appeals, an entity with those characteristics is an organ of the government of Mexico.<sup>121</sup>

These two descriptions of organs in their respective cases formed the basis for the balancing equation, first codified into various factors by a district court in the Eastern District of Pennsylvania. In *Supra Medical Corporation v. McGonigle*, the court held that to determine whether an entity was an organ of a foreign state, the relevant criteria were:

(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the country; and (5) how the entity is treated under foreign state law.<sup>122</sup>

Various courts have used this test and its factors with little question or investigation into their provenance.<sup>123</sup> In fact, since *Supra Medical* codified them, these factors have only been changed once. The Third Circuit Court of Appeals, in *USX Corp. v. Adriatic Insurance Co.*, separated the first factor into two separate ones (“(1) the circumstances surrounding the entity's creation; (2) the purpose of its

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 655.

<sup>121</sup> *Id.*

<sup>122</sup> *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997).

<sup>123</sup> See *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007); *Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 279 (5th Cir. 2007); *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000).

activities”) and added an additional one: the ownership structure of the entity.<sup>124</sup> Courts have applied these two formulations of the balancing factors (either the *Supra Medical* five or the *USX* seven) widely.<sup>125</sup> All this from simple descriptions of an Australian university and a Mexican refining subsidiary.

These factors are, quite simply, inadequate. Although courts mouth the mantra that the factors do not constitute a test to be applied rigorously and that the absence of any one characteristic does not necessarily foreclose organ status,<sup>126</sup> courts have almost exclusively used the *Supra/USX* factors to determine the level of control that the foreign state exercises over the entity.<sup>127</sup> Control and the multi-factor test have become the reigning standard by which courts determine whether an entity that is not majority-owned by a foreign state is nonetheless entitled to FSIA protection.<sup>128</sup> However, as this examination into the factors’ heritage has revealed, little or no consideration went into their development. They simply sprung into being from the description that two courts provided of the “organs” that they saw before them.<sup>129</sup> As an example of what the courts missed, if a foreign state had agreed to guarantee the debts of an entity, the suit would effectively be against the foreign state itself, but the entity in question would not be an organ under these factors.

A close examination of the factors themselves reveals further problems. As an initial matter, they overlap. For example, the entity’s treatment under foreign law, the foreign state’s oversight of that entity, and the employment of civil servants are likely to be intermingled.<sup>130</sup> When a court is mustering up all the relevant facts with which to support its holding it makes sense that they may overlap to some degree. That same overlap, however, leads to indistinct factors that do

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<sup>124</sup> *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003).

<sup>125</sup> See *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 211 (D. Del. 2007); *Vivas v. Boeing Co.*, No. 06 C 3566, 2007 U.S. Dist. LEXIS 61625, at \* 15-16 (D. Ill. Aug. 21, 2007); *RSM Prod. Corp. v. Petroleos de Venez. Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004).

<sup>126</sup> See *Nippon Tel. & Tel. Corp.*, 478 F.3d at 279; *Scheidemann v. Qatar Football Ass’n*, 2008 U.S. Dist. LEXIS 2852, at \*9 (S.D.N.Y. Jan. 15, 2008).

<sup>127</sup> See *Filler*, 378 F.3d at 217; *Kelly*, 213 F.3d at 845; *supra* note 126.

<sup>128</sup> *Kelly*, 213 F.3d at 845.

<sup>129</sup> See *supra* notes 109-25 and accompanying text.

<sup>130</sup> See *S. Ocean Seafood Co. v. Holt Cargo Sys.*, 1997 U.S. Dist. LEXIS 12159, at \*13-15 (E.D. Pa. Aug. 11, 1997) (discussing organ status of New Zealand Fisheries Commission and looking to entity’s treatment under New Zealand statutes for many of factors).

not lend themselves to a more generally applicable test purporting to describe all possible organs under all possible circumstances.

Most crucially, these factors do not properly address congressional intent. Applying these factors, to the exclusion of others, would allow or even force courts to ignore significant ways in which the entity might be tied to the foreign government.<sup>131</sup> This risks potentially justifiable offense to those governments. A broader-based approach to the organ question could avoid the potential for interference with the relations with those governments.

Finally, while the factors that comprise the organ inquiry need to be flexible to address Congress's foreign relations concerns, they also need to lead to predictable and uniform outcomes.<sup>132</sup> This secondary purpose serves to assuage foreign governments' concerns with disparate results from local bias and the civil jury system. It also allows parties to enter into contractual and other relationships with government-related entities while being aware of the possible consequences.<sup>133</sup> The creation of tests that are putatively of universal application in such an ad hoc and arbitrary manner has meant that the result cannot be predicted with any clarity *ex ante*. Developing a test by reaching into more developed areas of precedent will allow greater uniformity and predictability going forward.

A deeper look at the facts of *Supra Medical* demonstrates the potential problems with the application of the balancing test.<sup>134</sup> *Supra Medical* held that the United Medical and Dental Schools of Guy's and St. Thomas's Hospitals ("UMDS"), created by acts of the English parliament and receiving seventy percent of their funding from the English government, were not organs of the English state.<sup>135</sup> The only distinguishing factors from *Intercontinental Dictionary Series*, which conversely held that the ANU was an organ, were that *Supra Medical* held that (i) training and teaching doctors and dentists and medical and dental research served no national or governmental purpose and (ii) in the hundreds of years since Parliament founded them, there was not one example in England or the United States of the UMDS's being

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<sup>131</sup> See, e.g., *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 203-10 (D. Del. 2007) (noting reconstruction of war-torn Beirut was backdrop for supposed organ's creation, but never mentioning that fact in discussion of organ status).

<sup>132</sup> See H. R. REP. NO. 94-1487, at 11 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6609.

<sup>133</sup> *Id.*

<sup>134</sup> *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 375-77 (E.D. Pa. 1997).

<sup>135</sup> *Id.* at 379.



entitled to sovereign immunity.<sup>136</sup> A U.S. court’s determination of England’s national purpose in funding certain medical and dental schools and the absence of examples of the UMDS’s having been granted sovereign immunity (as opposed to examples of courts’ denying the UMDS such immunity<sup>137</sup>) cannot support the disparate treatment of the entities under the FSIA when the FSIA’s purpose is to avoid friction in foreign relations. England could have been justifiably affronted that a U.S. court granted the ANU the protections of the FSIA as part of the Australian government and denied those protections to the UMDS.

*b. The Public Activity Gloss*

The Ninth Circuit has followed a different path in the organ inquiry.<sup>138</sup> Based on one of its two early forays into this arena, it has focused on the question of whether an entity performs “a public activity on behalf of the foreign government” as a proxy for organ status.<sup>139</sup> In answering this question, it focuses on similar criteria to the balancing factors discussed above.<sup>140</sup> These factors and the public activity inquiry itself derived from the description of what the court saw before it in *Corporacion Mexicana* and *Gates*, rather than a studied exegesis of a foreign state organ.<sup>141</sup> Moreover, this gloss only serves to muddy the waters further. The Ninth Circuit has not defined “public activity” and it has arrived at wildly divergent results in applying this test. Two examples demonstrate the Ninth Circuit’s schizophrenia.

In *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, the Japanese government created the entity in question to “purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions.”<sup>142</sup> Based on its findings that (i) the entity was created by statute to revitalize the Japanese economy, (ii) it

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<sup>136</sup> Compare *id.* at 375-80 (denying organ status), with *Intercont’l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993) (granting organ status).

<sup>137</sup> *Supra Med. Corp.*, 955 F. Supp at 379 (relying on lack of such examples).

<sup>138</sup> See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds*, 538 U.S. 468 (2003).

<sup>139</sup> See *EOTT Energy Operating P’ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001).

<sup>140</sup> “In making this determination, courts examine the circumstances surrounding the entity’s creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.” *Patrickson*, 251 F.3d at 807-08.

<sup>141</sup> *Id.*

<sup>142</sup> *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003).

was funded by the Japanese government, (iii) its losses would be borne by the Japanese government, and (iv) many of its activities were assigned exclusively to the entity by the government, the court held that it served a public purpose and was, therefore, an organ of the Japanese state.<sup>143</sup> It reached this conclusion despite finding that the bank was “a private company that [was] engaged in a primarily commercial concern,” that many other companies were similarly authorized to collect distressed debts and assets, that its employees were not civil servants, and that it was not designated as a “public corporation” under Japanese law.<sup>144</sup>

The Ninth Circuit afforded different treatment to Israeli chemical companies that had been created by Israel to exploit the resources owned by the government of Israel in the Dead Sea in *Patrickson v. Dole Food Co., Inc.*<sup>145</sup> The court ignored its own findings that (i) the entities were classified as “government companies” under Israeli law, (ii) the government had the right to veto the appointment of directors and officers and any changes in their capital structure, (iii) the companies had to show their annual budgets and financial statements to various ministries, (iv) the government had some control over the use of company profits as well as officer and director salaries, and (v) the government also exercised control over the entities by owning the natural resources with which the companies worked.<sup>146</sup> Instead, the court focused on the fact that the entities acted to maximize profits rather than to “pursue public objectives.”<sup>147</sup> The court held that the companies were not “engaged in a public activity on behalf of” Israel and, therefore, were not organs of Israel.<sup>148</sup>

This dichotomy demonstrates the flaws in the public activity inquiry. As an initial matter, this patent lack of uniformity runs directly contrary to the purposes of the FSIA.<sup>149</sup> More fundamentally, as the *EIE* court found and the legislative history makes clear, the for-profit nature of the Israeli companies should not be important in determining whether they are agencies or instrumentalities of a foreign state.<sup>150</sup> While it is crucial to the ultimate decision about their

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<sup>143</sup> *Id.* at 640-41.

<sup>144</sup> *Id.*

<sup>145</sup> *Patrickson*, 251 F.3d at 807.

<sup>146</sup> *Id.* at 808.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *supra* notes 22, 66 and accompanying text.

<sup>150</sup> *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 641 (9th Cir. 2003).

entitlement to immunity, entities engaged in commercial activities are appropriate agencies and instrumentalities and, therefore, organs.<sup>151</sup> While the question of whether the entity “pursue[s] public objectives” remains relevant, it cannot be the litmus test that the Ninth Circuit made it.<sup>152</sup>

Even if one accepts that the public activity inquiry is the proper theory, it simply creates a new problem to solve the old one. Instead of clearly defining what “public” means in this context, the Ninth Circuit has relied on “non-commercial” in one case and has disregarded that distinction in another.<sup>153</sup> If a foreign government decides to develop its natural resources through a given entity to raise funds for public roads, instead of establishing an entity to increase and collect taxes for the same purpose, how could one be an organ due to its “public” activity, and the other not? Would a foreign government’s explicit statement that an otherwise commercial company was undertaking a public activity by raising revenue for the state be sufficient? Allowing FSIA protections to one entity as an organ of the foreign state and denying them to the other could justifiably affront that second state.

This is especially true given the incredible variety of vehicles that states use to pursue their goals. PPPs have dramatically increased in recent years.<sup>154</sup> Sovereign wealth funds provide an alternative to taxation for some governments. Various governments have entered into project finance arrangements with private entities to develop airports, toll roads, and other public goods, thereby inextricably linking private entities to governments.<sup>155</sup> Other states have

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<sup>151</sup> See H. R. REP. NO. 94-1487, at 16 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6614-15. *But see* Hardy, *supra* note 18, at 1144. Hardy states that Congress intended to exclude presumptively commercial entities from agency and instrumentality status. He bases this conclusion, however, on a statement in the legislative history from a different context. Hardy, *supra* note 18, at 1144 n.96. Congress noted that § 1603(b)(3) required that, to be an agency or instrumentality, an entity must not be United States citizens or entities formed under the laws of a third country because such entities are presumptively commercial or private. *Id.* This is not to say that such a requirement is in place for organs under § 1603(b)(3). Moreover, the list of possible entities that immediately follows the comment to which Hardy refers includes entities that are obviously commercial in nature, such as a trading company and a shipping and airline. H. R. REP. NO. 94-1487, at 15-16.

<sup>152</sup> H. R. REP. NO. 94-1487, at 15-16.

<sup>153</sup> See *supra* notes 142-48 and accompanying text.

<sup>154</sup> See *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 203-10 (D. Del. 2007) (describing public-private partnership in all but name).

<sup>155</sup> See generally, e.g., David Blumental, *Sources of Funds and Risk Management for*

nationalized industries in their attempts to provide for their population.<sup>156</sup> In each foreign jurisdiction, the government and its legal and economic system may create myriad public, private, corporate, and other structures to fulfill diverse and wide-ranging purposes; it is not the place of a U.S. court to substitute its judgment for that of the state in question as to whether a given activity is public. Especially when Congress intended to minimize friction with foreign governments and where the public activity inquiry can only heighten that friction, we must look elsewhere for the organ inquiry.

Finally, the courts have not been consistent in how they think about public activities. The *Patrickson* court, for example, focused on the similarity between the control that Israel exerted over the companies and that which a majority shareholder might exercise.<sup>157</sup> It is thoroughly unclear how the control that a government has exercised or might exercise over an entity determines whether that entity undertakes a public activity.<sup>158</sup> Although it might be relevant to the question of whether the public activity was “on behalf of” the government, the court does not appear to have been making that point. Indeed, as discussed previously, control is the other key to the gateway to organ status when one is not following the public activity test.<sup>159</sup>

Even assuming control is relevant to the public activity test, the Ninth Circuit in *Patrickson* was incorrect to imply that something more than majority ownership would be needed.<sup>160</sup> Majority ownership is one of the harbingers of an agency or instrumentality and would be sufficient under direct ownership.<sup>161</sup> There is nothing to suggest that anything approaching a veil piercing level of control would be necessary under the organ criteria. Indeed, courts have also repeatedly made this point clear — that something less than a veil piercing level of control is necessary to bring an entity within the

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*International Energy Projects*, 16 BERKELEY J. INT’L L. 267 (1998) (describing government involvement in energy sector).

<sup>156</sup> See generally Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995) (discussing privatizations of and in developing states).

<sup>157</sup> *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001).

<sup>158</sup> *Id.*

<sup>159</sup> See *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 654 (D. Tenn. 1998) (organ can loosely be defined as entity that *either* performs government function or which is ultimately controlled by state) (emphasis added).

<sup>160</sup> *Patrickson*, 251 F.3d at 808.

<sup>161</sup> 28 U.S.C. § 1603(b)(2) (2000 & Supp. V 2005); see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003).

ambit of the government’s FSIA immunity.<sup>162</sup> In *Gates*, the Ninth Circuit itself made that very point.<sup>163</sup> It focused on the control that the government of the province of Alberta exercised over a marketing board for pork products to hold that the board was an organ of a political subdivision.<sup>164</sup> Referencing the alter ego doctrine from veil piercing, the court held that a party need not show such an extreme level of control; something less was necessary to show that the marketing board was an organ of the state.<sup>165</sup>

Some version of the public activity question is ultimately relevant to the organ question. The FSIA should treat any entity to which the government has ceded a significant amount of its sovereignty or that performs core or traditional government functions as part of the foreign state. Indeed, some courts do consider those entities part of the foreign state itself.<sup>166</sup> Such entities often enjoy immunity in addition to procedural protections, because their activities are not likely to fall within the commercial or other exceptions. The problem with using a public activity inquiry as the only question is that the converse does not follow — there can very well be organs of foreign states that do not exercise sovereign power. The challenge for the organ inquiry is to address both possibilities competently.

*c. Powerex*

In 2007, the Supreme Court granted certiorari in *Powerex Corp. v. Reliant Energy Services* on the question of whether, under the FSIA, “petitioner [wa]s an ‘organ of a foreign state or political subdivision thereof.’”<sup>167</sup> Although the majority opinion dismissed the appeal because the appellate court had lacked jurisdiction over the distinct court’s decision to remand,<sup>168</sup> Justice Breyer, joined by Justice Souter,

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<sup>162</sup> See *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 276 n.37 (S.D. Tex. 1997).

<sup>163</sup> *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995).

<sup>164</sup> *Id.* at 1460-61.

<sup>165</sup> *Id.* Again, this reference to an existing body of law has been largely ignored.

<sup>166</sup> See *supra* note 55.

<sup>167</sup> *Powerex v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2414 (2007) (citing 28 U.S.C. § 1603(b)(2) (2005)).

<sup>168</sup> *Id.* The Supreme Court granted certiorari on one of the questions raised by the parties, “namely to decide whether, under [FSIA], petitioner is an ‘organ of a foreign state or political subdivision thereof.’” *Id.* at 2414. However, in the order granting the petition for certiorari, the Court directed the parties to address an additional question: whether the Ninth Circuit had properly exercised jurisdiction to review the district court’s decision to remand the case to state court. *Id.* This question was the basis for the majority’s ultimate dismissal of the action. *Id.* at 2421.

disagreed that jurisdiction was absent<sup>169</sup> and reached the underlying FSIA question.<sup>170</sup>

Justice Breyer did not posit a test to determine organs of foreign states.<sup>171</sup> He followed the path of the earlier cases and described the relevant factors that he saw before the court, rather than offering a comprehensive scheme for determining organ status.<sup>172</sup> He considered the following facts important to his ultimate determination that Powerex was an organ of the Province of British Columbia (a decision that would have overturned the Ninth Circuit on the merits): (1) Powerex was government owned;<sup>173</sup> (2) it was government operated;<sup>174</sup> (3) it was not meaningfully different from the Tennessee Valley Authority (“TVA”) or other foreign public power companies;<sup>175</sup> (4) it was created by the written directive of the Province;<sup>176</sup> (5) it conducted its business pursuant to the terms of various treaties between the United States and Canada governing their water resources;<sup>177</sup> (6) it was owned by a governmental entity that was itself an agency or instrumentality of the provincial government;<sup>178</sup> (7) its board members consisted of individuals who overlapped with that entity, and those board members filled the remaining seats by appointing others;<sup>179</sup> (8) the government reviewed its financial

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<sup>169</sup> *Id.* at 2421-24.

<sup>170</sup> *Id.* at 2424-26.

<sup>171</sup> *Id.*

<sup>172</sup> Compare *id.* at 2424-26 (noting relevant facts of Powerex), with *Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 279-80 (5th Cir. 2007) (using test purporting to apply universally), and *Peninsula Asset Mgmt. v. Hankook Tire Co.*, 476 F.3d 140, 143-44 (2d Cir. 2007) (same), and *Filler v. Hanvit Bank*, 378 F.3d 213, 216-20 (2d Cir. 2004) (same), and *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206-09 (3d Cir. 2003) (same), and *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845-47 (5th Cir. 2000), and *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996) (same), and *Scheidemann v. Qatar Football Ass'n*, 2008 U.S. Dist. LEXIS 2852, at \*3-5 (S.D.N.Y. Jan. 15, 2008) (same), and *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 210-11 (D. Del. 2007) (same), and *RSM Prod. Corp. v. Petroleos de Venez. Societa Anonima*, 338 F. Supp. 2d 1208, 1214-16 (D. Colo. 2004) (same), and *Intercont'l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993) (same).

<sup>173</sup> *Powerex*, 127 S. Ct. at 2424.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 2424-25.

<sup>176</sup> *Id.* at 2425.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

performance;<sup>180</sup> (9) the government determined the manner in which it conducted its affairs;<sup>181</sup> (10) provincial statutes referred to it as a “government body”;<sup>182</sup> and (11) any profit that Powerex generated went to the public coffers and was not distributed to private shareholders.<sup>183</sup>

Justice Breyer also criticized the bases for the Ninth Circuit’s decision that Powerex was not an organ of British Columbia. He noted that the circuit court erred in relying on Powerex’s having earned a profit and not having been directly financed by the government in holding that it was not an organ within the meaning of the FSIA.<sup>184</sup> Indeed, he noted, if the entity was worth the government’s time, it should be profitable and able to avoid government funding.<sup>185</sup> The appropriate question was where the profits went after Powerex earned them.<sup>186</sup> If the profits went to the public good, then that supported the conclusion that the entity was an organ.<sup>187</sup> Less caustically, Justice Breyer noted that the fact that not all of the regulations that covered other governmental departments governed Powerex was not dispositive of a lack of organ status either.<sup>188</sup> Again, he compared Powerex to the TVA and determined that the similarity of the two entities supported Powerex’s status as an organ.<sup>189</sup>

Justice Breyer finally noted that “Powerex is the kind of government entity that Congress had in mind when it wrote the FSIA’s ‘commercial activity’ provisions.”<sup>190</sup> This final summary point is perhaps his most important observation for our purposes here. Here, Justice Breyer hones in on the distinction between entitlement to FSIA protections as a foreign state and immunity from suit, as well as the differences between their respective purposes. *Powerex* demonstrates that certain entities must be entitled to sovereign treatment because of their inextricable links with foreign states even though their activities are commercial and, therefore, subject to an exception from immunity.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2426.

<sup>182</sup> *Id.* at 2425.

<sup>183</sup> *Id.* at 2426.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

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II. THE ANALOGOUS DOCTRINES: THE ELEVENTH AMENDMENT AND VEIL PIERCING

Despite occasional references to other areas of the law, courts have created the tests for organ of a foreign state largely out of whole cloth.<sup>191</sup> Those references, though ignored, were not arbitrary and offer the opportunity to provide additional ballast to the organ inquiry. For example, despite a reference to the Eleventh Amendment in the first case to consider the meaning of “organ,”<sup>192</sup> courts and commentators have never undertaken serious analysis of the extent to which Eleventh Amendment doctrine might inform the definition of “organ of a foreign state.” The parallel is nevertheless clear; both doctrines seek to determine the extent to which immunity may cloak a separate entity.

The alter ego veil piercing doctrine provides another fecund source.<sup>193</sup> Veil piercing is the equitable doctrine by which a court will ignore the corporate form and impose liability on the parent corporation (or possibly even its shareholders) of a subsidiary.<sup>194</sup> Courts examine, among other things, whether a parent so dominates and controls a subsidiary that the subsidiary ceases to have a separate existence.<sup>195</sup> While the extent of control necessary for veil piercing is significantly greater than that needed to prove organ status, this is a

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<sup>191</sup> See *supra* notes 115-17 and accompanying text; see also *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995).

<sup>192</sup> See *Intercont'l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 670 (C.D. Cal. 1993).

<sup>193</sup> Some courts refer to this doctrine as the “mere instrumentality” theory of veil piercing. See *Gale Contractor Servs. v. Wiltbank*, No. DV-06-301, 2007 Mont. Dist. LEXIS 429, at \*14 (Mont. Dist. Oct. 3, 2007); Timothy P. Glynn, *Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 344-45 & n.65 (2004). Glynn notes that some courts apply slightly different tests based on the label of “alter ego” or “mere instrumentality,” but they can be considered together because “they are premised on the lack of any de facto distinction between the shareholder and the corporation.” Glynn, *supra* note 193, at 345 n.65. Moreover, in terms of their use in analogizing to the FSIA and what entities should be considered organs, the distinctions are immaterial. To avoid confusion with the use of “instrumentality” in the text of the FSIA, I will refer to the amalgamation of “alter ego” and “mere instrumentality” theory tests as the “alter ego” doctrine.

<sup>194</sup> See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 482 (2001). While veil piercing can be used between a corporation and its individual shareholders, for the purposes of this Article, the parent-subsidary relationship provides a better analogy. Therefore, and for simplicity’s sake, I will refer only to the parent-subsidary relationship and not to the possibility of individual shareholders.

<sup>195</sup> *Id.* at 507-10.



very similar inquiry to that which many courts have undertaken in the organ context.<sup>196</sup> Some have even explicitly noted it.<sup>197</sup>

#### A. *Arm of the State*

The Supreme Court has repeatedly held that in addition to the state itself, the Eleventh Amendment protects entities with sufficient connections to that state,<sup>198</sup> the analogy to organ immunity under the FSIA is obvious.<sup>199</sup> Determining whether an entity is an arm of the state requires an analysis of the relationship between the state and the entity,<sup>200</sup> but the crucial inquiry is often whether a judgment against the entity would effectively be a judgment against the state itself.<sup>201</sup> The Supreme Court has provided no specific test<sup>202</sup> for these heavily fact-dependent inquiries.<sup>203</sup> To fill that gap, the courts of appeals have each developed their own version of a multi-factor balancing test.<sup>204</sup>

These balancing tests have largely developed organically and, thus, contain differences in language, content, and application. There are, however, trends and significant areas of overlap within the factors the courts consider, allowing a certain level of generalization that is helpful to our purposes here.<sup>205</sup> In general terms, courts consider the

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<sup>196</sup> See *Gates*, 54 F.3d at 1460.

<sup>197</sup> *Id.*

<sup>198</sup> See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979).

<sup>199</sup> See *Intercont'l Dictionary Series v. DeGruyter*, 822 F. Supp. 662, 672 (C.D. Cal. 1993).

<sup>200</sup> See *Regents of the Univ. of Cal.*, 519 U.S. at 429.

<sup>201</sup> See *Lake Country Estates*, 440 U.S. at 401; Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 248 (1988).

<sup>202</sup> See Bladuell, *supra* note 32, at 838-42.

<sup>203</sup> See *Benning v. Bd. of Regents of Regency Univs.*, 928 F.2d 775, 777 (7th Cir. 1991).

<sup>204</sup> See *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1043-44 (11th Cir. 2007); *Bowers v. NCAA*, 475 F.3d 524, 546 (3d Cir. 2007); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 261-62 (4th Cir. 2005); *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770-71 (7th Cir. 2005); *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005); *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico*, 322 F.3d 56, 68-72 (1st Cir. 2003); *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 689 (5th Cir. 2002); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164-65, 1167, 1170 (10th Cir. 2000); *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir. 1996).

<sup>205</sup> While the organic development of these tests suffers from the same flaw as the

financial connection between the state and the entity, the level of control exercised by the state over the entity, the legal or formal relationship between the state and the entity, and the function to which the state has tasked the entity.<sup>206</sup>

The financial connection between the entity and the state has long been one of the criteria for determining whether an entity is an arm of the state.<sup>207</sup> In determining the financial connections, some courts look to the connection between the state and the entity generally,<sup>208</sup> and all look to the effect of the potential judgment on the state treasury.<sup>209</sup> At the state level, courts inquire into the entity's funding sources, including whether the state provides direct funding.<sup>210</sup> At the transactional level, the inquiry does not involve merely tracing potential payments back to the state, but rather investigating who will bear the ultimate legal and financial liability for a potential

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organ test, discussed *supra* notes 100-58, it does not render the logic of that precedent inapposite to the organ question. Rather, the tests (and the specific examples that many of those tests represent) provide more data from which to construct a better picture of an organ of a foreign state.

<sup>206</sup> See 17A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE – CIVIL* § 123.23 (3d ed. 2007). The question of whether an entity is an arm of the state often arises in the context of diversity jurisdiction, rather than a direct assertion of immunity. See, e.g., *Univ. of R.I. v. A. W. Chesterton Co.*, 2 F.3d 1200, 1203 (1st Cir. 1993) (noting that inquiries under Eleventh Amendment and diversity jurisdiction are substantially same). Since a state is not a citizen for immunity purposes, see *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894), parties seeking to defeat diversity jurisdiction and obtain remand to state court will often argue that an entity is an arm of the state and, thus, federal subject matter jurisdiction does not exist. See *Miss. Veterans Home Purchase Bd. v. State Farm Fire & Cas. Co.*, 492 F. Supp. 2d 579, 582 (S.D. Miss. 2007). The recent case involving West Virginia University and their former football coach, Rich Rodriguez, is a well-publicized example. See *W. Va. Univ. Bd. of Governors ex rel. W. Va. Univ. v. Rodriguez*, 543 F. Supp. 2d 526, 529-30 (D. W. Va. 2008).

<sup>207</sup> Some courts used to consider it a threshold question, such that if a judgment would come from the state treasury, it would largely end the inquiry. The Supreme Court subsequently relegated this question back to equal status along with other considerations, because “[W]hile state sovereign immunity serves the important function of shielding state treasuries . . . the doctrine’s central purpose is to accord the States the respect owed them as joint sovereigns.” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002).

<sup>208</sup> See *Woods*, 466 F.3d at 240; *Md. Stadium Auth.*, 407 F.3d at 261; *Takle*, 402 F.3d at 770-71; *Sturdevant*, 218 F.3d at 1164-65.

<sup>209</sup> See *Rosario*, 506 F.3d at 1043-44; *Bowers*, 475 F.3d at 546-48; *Woods*, 466 F.3d at 240; *Ernst*, 427 F.3d at 359; *Md. Stadium Auth.*, 407 F.3d at 261; *Takle*, 402 F.3d at 769-70; *Beentjes*, 397 F.3d at 778; *Fresenius*, 322 F.3d at 68, 72; *Vogt*, 294 F.3d at 689; *Sturdevant*, 218 F.3d at 1165-66; *Hadley*, 76 F.3d at 1439.

<sup>210</sup> See *Woods*, 466 F.3d at 240; *Md. Stadium Auth.*, 407 F.3d at 261; *Takle*, 402 F.3d at 769-71.

judgment.<sup>211</sup> The question is whether that liability would be paid by the state, either directly, such as because of an indemnification arrangement,<sup>212</sup> or because the legal liability could be traced to the state treasury.<sup>213</sup> Similarly, courts ask whether the state might ultimately be left holding the tab because of its agreement to fund the entity completely.<sup>214</sup>

The question of control shows itself in several incarnations and in various factors. Those factors fall into two categories: how much control the state exercises over the board of directors and how much it exercises over the entity itself. To address the former, courts often inquire whether the state controls board formation<sup>215</sup> or appoints its members directly.<sup>216</sup> Courts approach the latter either head on (i.e., what is the degree of control that the state exercises over the entity)<sup>217</sup> or, conversely, by inquiring into the entity’s autonomy from the state.<sup>218</sup> Some circuits have further specified subsidiary questions, such as the extent to which the state can exercise control over the board’s actions, by veto<sup>219</sup> or direct control,<sup>220</sup> or enlarge or contract the entity’s responsibilities.<sup>221</sup>

The third area of connection between the state and the entity that courts explore is the legal and formal ties between them. This area sees the greatest divergence among the questions that the courts of appeals typically ask. However, almost all first inquire about the

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<sup>211</sup> *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1993) (noting that question of whether entity should be considered “arm of the state” for Eleventh Amendment immunity purposes is not “formalistic question of ultimate financial liability” such that “the presence or absence of a third party’s undertaking to indemnify the agency should determine” question).

<sup>212</sup> See *Rosario*, 506 F.3d at 1043-44.

<sup>213</sup> See *Sturdevant*, 218 F.3d at 1167.

<sup>214</sup> See *Ernst*, 427 F.3d at 359-60.

<sup>215</sup> See *Woods*, 466 F.3d at 240; *Md. Stadium Auth.*, 407 F.3d at 261.

<sup>216</sup> See *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico*, 322 F.3d 56, 71-72 (1st Cir. 2003).

<sup>217</sup> See *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 779-80 (9th Cir. 2005); *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir. 1996).

<sup>218</sup> See *Bowers v. NCAA*, 475 F.3d 524, 546 (3d Cir. 2007); *Ernst*, 427 F.3d at 359; *Md. Stadium Auth.*, 407 F.3d at 261; *Vogt v. Bd. of Comm’rs*, 294 F.3d 684, 689 (5th Cir. 2002); *Sturdevant*, 218 F.3d at 1168; *Hadley*, 76 F.3d at 1439.

<sup>219</sup> See *Woods*, 466 F.3d at 240; *Md. Stadium Auth.*, 407 F.3d at 261; *Fresenius*, 322 F.3d at 70-72.

<sup>220</sup> See *Ernst*, 427 F.3d at 359; *Vogt*, 294 F.3d at 694-95.

<sup>221</sup> See *Fresenius*, 322 F.3d at 65.

treatment of the entity under state law.<sup>222</sup> This inquiry includes an examination of statutory references to the entity as well as how state courts and administrative agencies treat the entity.<sup>223</sup> Additional questions relevant to the legal and formal ties between state and entity include whether the founding documents of the entity refer to its connection to the state;<sup>224</sup> whether it can sue or be sued in its own name;<sup>225</sup> whether it is separately incorporated;<sup>226</sup> whether it is immune from taxation;<sup>227</sup> whether it can hold or use property;<sup>228</sup> and its ability to tax or issue bonds.<sup>229</sup>

Finally, some courts look to the function and purpose of the entity. The key here is whether the entity serves a statewide or local purpose.<sup>230</sup> The Eleventh Amendment extends immunity to states but not to municipalities and other sub-divisions of the state.<sup>231</sup> Thus, this distinction takes on prime importance — if the entity relates more to a county or other subdivision, it will not be entitled to immunity.

### B. *Alter Ego Veil Piercing*

Veil piercing<sup>232</sup> ignores the separate legal status of a corporation to impose liability on its parent corporation (or, less frequently, its

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<sup>222</sup> See *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1043-44 (11th Cir. 2007); *Bowers*, 475 F.3d at 546; *Woods*, 466 F.3d at 240; *Ernst*, 427 F.3d at 359; *Md. Stadium Auth.*, 407 F.3d at 261; *Fresenius*, 322 F.3d at 68-70; *Vogt*, 294 F.3d at 689; *Sturdevant*, 218 F.3d at 1167; *Hadley*, 76 F.3d at 1439.

<sup>223</sup> See cases cited *supra* note 222.

<sup>224</sup> See *Woods*, 466 F.3d at 240; *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769-70 (7th Cir. 2005).

<sup>225</sup> See *Bowers*, 475 F.3d at 546, 548; *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005); *Vogt*, 294 F.3d at 689.

<sup>226</sup> See *Bowers*, 475 F.3d at 546, 548; *Beentjes*, 397 F.3d at 778.

<sup>227</sup> See *Bowers*, 475 F.3d at 546, 548.

<sup>228</sup> See *Beentjes*, 397 F.3d at 778; *Vogt*, 294 F.3d at 689.

<sup>229</sup> See *Sturdevant v. Paulson*, 218 F.3d 1160, 1166 (10th Cir. 2000).

<sup>230</sup> See *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 261 (4th Cir. 2005); *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770-71 (7th Cir. 2005); *Beentjes*, 397 F.3d at 778; *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico*, 322 F.3d 56, 65 (1st Cir. 2003); *Vogt*, 294 F.3d at 689; *Sturdevant*, 218 F.3d at 1168-69.

<sup>231</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

<sup>232</sup> While there are four traditional common-law piercing doctrines, see Glynn, *supra* note 193, at 344, I focus on the alter ego theory here. The fraud doctrine is inapposite to the organ-state relationship because the term “organ” is a statutory construct created without equitable considerations in mind. Similarly, the “enterprise” theory does not apply here because it does not focus on the vertical

shareholders).<sup>233</sup> In much the same way, the organ status of an entity allows that entity to pierce the government’s “veil,” ignoring their legal separateness, and make use of its entitlements under the FSIA. The alter ego test for veil piercing typically involves two inquiries: first, whether the parent corporation exercised sufficient domination and control over the subsidiary corporation such that the separate legal existence of the parent and the subsidiary should be ignored;<sup>234</sup> and, second, whether an inequitable result would follow from enforcing the separate legal status of the two entities.<sup>235</sup> We focus here on the first question, because equity or the lack thereof is not relevant to the organ inquiry.<sup>236</sup>

The factors that courts apply to determine domination and control can be placed in four categories similar to those discussed above regarding the Eleventh Amendment.<sup>237</sup> Courts measure the financial connections between the parent and subsidiary,<sup>238</sup> the legal intermingling between the two,<sup>239</sup> the day-to-day management control that the parent imposes on the subsidiary,<sup>240</sup> and the use that the parent makes of the subsidiary.<sup>241</sup>

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relationship with a parent corporation or entity. Rather, it focuses on horizontally arranged entities, relationships that are not analogous to the organ-foreign state alignment. See *id.* at 346-47. Finally, the agency theory is poorly articulated and courts that use it generally apply an alter ego analysis, only by another name, but without the requirement of shareholder misconduct. *Id.* at 347.

<sup>233</sup> Although courts have occasionally applied veil piercing to access the assets of individual shareholders in the context of a close corporation, they only rarely use it to attack the assets of the shareholders of publicly held corporations. See Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039, 1047 (1991) (finding that veil piercing was limited to close corporations and inter-corporate relationships).

<sup>234</sup> See Bainbridge, *supra* note 194, at 506-09 (discussing various formulations of alter ego-instrumentality test and determining that all require some unknown degree of control and domination of subsidiary by parent or shareholder).

<sup>235</sup> *Id.*; see also Glynn, *supra* note 193, at 345-46.

<sup>236</sup> See *supra* note 233.

<sup>237</sup> There are, quite simply, too many different versions of the factors that investigate unity of interest or ownership under the first prong of the alter ego test to list here. Moreover, each of those versions contains multiple factors. I will therefore provide a representative sample of the typical factors used in the alter ego tests.

<sup>238</sup> See Bainbridge, *supra* note 194, at 507 (noting that courts require plaintiffs seeking to pierce corporate veil to show parent control of subsidiary “finances, policy, and business practices”).

<sup>239</sup> See *id.* at 509-13.

<sup>240</sup> See *id.* at 507 (stating “control is essential prerequisite for” veil piercing).

<sup>241</sup> See Glynn, *supra* note 193, at 345.

Courts test the financial separateness of the parent and subsidiary in a variety of different ways. The first major avenue is to focus on the flows of assets between the two entities. Typical factors within this category are the commingling of funds<sup>242</sup> or the treatment of assets of one corporation as assets of the other.<sup>243</sup> Many courts refuse to pierce the veil unless the subsidiary was undercapitalized.<sup>244</sup> A second avenue of inquiry is the converse; courts focus on the debt of the subsidiary corporation. Courts might ask whether the parent pays the salaries of the subsidiary's employees<sup>245</sup> or pays or guarantees the payment of the expenses<sup>246</sup> or debts of the subsidiary.<sup>247</sup> Finally, courts examine whether the parent directly finances the operations of the subsidiary.<sup>248</sup>

In examining the legal or formal separateness of the two entities, courts look at the circumstances surrounding the subsidiary's formation (or acquisition), its ownership structure, and its observance of corporate formalities. The first two are relatively self-explanatory, but the last warrants further discussion. Courts look at "picayune" areas in which corporate law mandates compliance.<sup>249</sup> They ask (i) whether the subsidiary keeps separate books,<sup>250</sup> (ii) whether it holds regular shareholder or board meetings,<sup>251</sup> (iii) whether it maintains an arm's length relationship with the parent corporation,<sup>252</sup> and (iv) whether the formalities for stock issuance are followed.<sup>253</sup> These factors are often not important individually, but the underlying

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<sup>242</sup> See *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 520-21 (7th Cir. 1991).

<sup>243</sup> See *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988); *Associated Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813 (Cal. Dist. Ct. App. 1962).

<sup>244</sup> See *Am. Fuel Corp. v. Utah Energy Dev. Corp.*, 122 F.3d 130, 134 (2d Cir. 1997); *Associated Vendors, Inc.*, 26 Cal. Rptr. at 814.

<sup>245</sup> See *United Steelworkers of Am.*, 855 F.2d at 1505.

<sup>246</sup> See *id.*

<sup>247</sup> See *Am. Fuel Corp.*, 122 F.3d at 134.

<sup>248</sup> See *United Steelworkers*, 855 F.2d at 1505.

<sup>249</sup> See *Bainbridge*, *supra* note 194, at 512.

<sup>250</sup> See *Associated Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813 (Cal. Dist. Ct. App. 1962).

<sup>251</sup> See *Phillips v. Englewood Post No. 322 Veterans of Foreign Wars of the U.S., Inc.*, 139 P.3d 639, 646 (Colo. 2006).

<sup>252</sup> See *Agway, Inc. v. Brooks*, 790 A.2d 438, 441 (Vt. 2001).

<sup>253</sup> See *id.*

consideration of whether corporate formalities have been observed is almost a sine qua non of alter ego veil piercing.<sup>254</sup>

Evaluating the operational control that the parent exercises involves a mainly structural analysis of the relationship between the two corporations. Courts look at whether the members of the boards of directors<sup>255</sup> or employees overlap<sup>256</sup> and whether the two companies use the same attorneys.<sup>257</sup> The question is, fundamentally, whether the subsidiary is autonomous or merely a “puppet” of the parent.<sup>258</sup>

Finally, courts look at how the parent uses the subsidiary. Courts question the nature of the parent’s and subsidiary’s businesses, asking whether the subsidiary is treated “as an independent profit center,”<sup>259</sup> whether the parent uses it as a vehicle for its own needs (i.e., goods, services or labor),<sup>260</sup> and whether the subsidiary’s business exists solely as a result of its relationship with its parent.<sup>261</sup> Another area of inquiry involves more incidental affairs, such as whether the two entities share office space or telephone numbers.<sup>262</sup>

### III. “ORGAN” REVISITED: HOW NOT TO REINVENT THE WHEEL

We have learned that courts have approached § 1603(b)(2) and the definition of “organ” with blinders on. Most courts have been content to rely on the early cases as the path through the FSIA’s “statutory labyrinth”<sup>263</sup> without giving the organ question its due consideration. Courts’ failure to analogize to the arm of the state doctrine under the Eleventh Amendment and to the alter ego theory of veil piercing, despite their occasional mention, is simply further evidence of the inadequacy of the current state of the law. The result is that courts may have borrowed the “mists of metaphor” from veil piercing, but

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<sup>254</sup> See Bainbridge, *supra* note 194, at 512-13.

<sup>255</sup> See *Olympic Holding Co. v. ACE Ltd.*, No. 07AP-168, 2007 Ohio 6643, at ¶ 88 (Ct. App. 2007).

<sup>256</sup> See *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 313 (Conn. App. Ct. 2002); *Associated Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 814 (Cal. Dist. Ct. 1962).

<sup>257</sup> See *Oceanics Schs. v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003).

<sup>258</sup> *Zaist v. Olson*, 227 A.2d 552, 557 (Conn. 1967).

<sup>259</sup> *Am. Fuel Corp. v. Utah Energy Dev. Corp.*, 122 F.3d 130, 134 (2d Cir. 1997).

<sup>260</sup> See *Associated Vendors*, 26 Cal. Rptr. at 814.

<sup>261</sup> See *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988).

<sup>262</sup> See *Am. Fuel Corp.*, 122 F.3d at 134.

<sup>263</sup> *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985) (quoting *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982)).

little else.<sup>264</sup> My proposal is for courts not to reinvent the wheel. Rather than attempting to invent metrics for an organ of a foreign state, they should look to congressional intent and the general structure of the FSIA for the inquiry (i.e., whether the sovereign could be justifiably affronted), with the analogs of the arm of the state and veil piercing as guides to its application.

A. *Analogizing and Distinguishing the Arm of the State and Alter Ego Doctrines*

The brief summary of the arm of the state doctrine and the alter ego theory of veil piercing has demonstrated that these inquiries have some things in common. Both investigate, at some level, the control that the parent/state can or does exercise over the subsidiary/entity and the specific tasks to which the parent/state sets the subsidiary/entity.<sup>265</sup> They both evaluate the legal and formal ties between the two<sup>266</sup> and they both look at various indicia of their financial interdependence.<sup>267</sup> Finally, they both weigh the uses to which the parent/state puts the entity/subsidiary.

There is no good reason why courts should not approach the organ question in the same way. As the courts that follow the balancing test have held, the level of control a sovereign exerts over the entity is crucial in determining whether that entity is an organ.<sup>268</sup> Moreover, if the government surrenders some of its authority to a separately-incorporated entity, the failure to extend sovereign immunity to the entity would run contrary to the FSIA's purposes. What ultimately must govern this entire discussion is the extent to which a reasonable foreign government would be annoyed by a U.S. court's failure to afford the entity the benefits of the FSIA; viewing the relationship

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<sup>264</sup> *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983) (quoting Justice Cardozo in *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58 (N.Y. 1926)).

<sup>265</sup> *Compare, e.g., Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1254 (10th Cir. 2007) (looking at control to determine whether entity was "arm of the state"), *with, e.g., Messick v. Moring*, 514 So. 2d 892, 894 (Ala. 1987) (requiring domination and control before piercing corporate veil).

<sup>266</sup> *Compare, e.g., Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) ("arm of the state"), *with, e.g., Evans v. Multicon Constr. Corp.*, 574 N.E.2d 395, 398 (Mass. App. Ct. 1991) (looking at various failures to comply with state corporate laws).

<sup>267</sup> *Compare, e.g., Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, 862 (D. Mich. 2004) ("[F]inancial connections to the State of Michigan were sufficiently strong to warrant deeming them 'arms of the state.'"), *with, e.g., Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1168 (La. 1991) (looking at commingling of funds).

<sup>268</sup> *See supra* note 128 and accompanying text.



through the twin lenses of the Eleventh Amendment and veil piercing will assist courts in so doing.

### 1. The Arm of the State Doctrine

It is hard to imagine why courts have not yet applied the arm of the state logic in some reasoned fashion to organ of a foreign state. The main thrust of the two inquiries is the same — will a failure to treat the entity in question as part of the state, be it foreign or domestic, impinge on that state’s sovereignty?<sup>269</sup> Despite the similarity of these inquiries, there are a variety of connections between the state and the entity that courts examine in the Eleventh Amendment context, but ignore under the FSIA. Some of those missing inquiries are simply inapposite to the FSIA context, but others analogize easily and their absence from the organ analysis cannot be readily explained. I will first discuss those areas of Eleventh Amendment inquiry that would be useful to the organ consideration and then examine the justifiable absence of certain other criteria.

#### *a. How the Arm of the State Doctrine Can Help*

The first lesson from the arm of the state doctrine is that courts considering whether an entity is an organ should investigate the effect any adverse judgment will have on the public coffers of the foreign state, in addition to focusing on the general relationship between the state and the entity.<sup>270</sup> The Supreme Court has been clear that the primary concern is not the tracing of the funds used back to the state, but rather whether the state bears ultimate legal liability for the judgment.<sup>271</sup> This explicitly derives directly from one of the twin purposes of the Eleventh Amendment: to protect state treasuries from federal intrusion.<sup>272</sup>

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<sup>269</sup> *In re Ayers*, 123 U.S. 443, 505 (1887) (“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”); *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 382 (S.D.N.Y. 2001) (stating “a central purpose of the FSIA [is] to respect the sovereignty of foreign states”).

<sup>270</sup> *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997).

<sup>271</sup> *Id.*

<sup>272</sup> The other purpose of the Eleventh Amendment, respecting the dignity of the states, is implicit throughout the FSIA, but does not lead to any specific additional considerations. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39-40, 47 (1994).

That same purpose is not directly applicable in the FSIA context. Despite this fact, the effect of an adverse judgment against the entity in question must be relevant to the FSIA's purposes as well. The foreign state would be justifiably upset if the entity that it agreed to indemnify or on whose behalf it is expending public funds to pay an adverse judgment was not treated like an organ of the foreign state. Thus, while the purposes of the FSIA do not explicitly call for this consideration as those of the Eleventh Amendment do, the effect of a lawsuit against an entity on the public treasury of the foreign state is certainly relevant to whether that entity is an organ.

The second and perhaps most important lesson that the comparison of these two doctrines reveals is that inquiring into the public character of the entity's activities is not particularly helpful, especially as the sole bellwether of organ status. Courts do not inquire into the commercial nature of the actions of the putative arm of the state,<sup>273</sup> why should they do so with foreign state organs? Rather than promoting such an inquiry, the FSIA's commercial activity exception to immunity reinforces the point that entities without a public purpose (i.e., commercial entities) can be organs. While the FSIA codified the doctrine of restrictive immunity, which limits grants of immunity to sovereign (non-commercial) acts, Congress granted certain additional benefits to foreign states regardless of whether the court ultimately granted immunity. In so doing, Congress intended to limit interference with the Executive's ability to conduct foreign relations even in those cases where immunity was not appropriate. While it will likely not be entitled to immunity under the FSIA, a commercial entity remains a possible candidate for organ status and the FSIA's consequent procedural safeguards.

There is a final lesson that bears special mention. The arm of the state doctrine teaches us that, ultimately, the court determining an entity's entitlement to sovereign protection must consider the

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<sup>273</sup> See *English v. Univ. of Haw.*, No. 3:04-7-JMH, 2005 U.S. Dist. LEXIS 22661, at \*5-6 (D. Ky. Oct. 5, 2005). There appears to have been some confusion in the interpretation of Moore's Federal Practice's note on this point. Moore's notes that the question asked by the Supreme Court was "whether the entity performs functions typically performed by a state government." See MOORE'S FEDERAL PRACTICE, *supra* note 206, § 123.23. A closer analysis reveals that this question refers to the state-wide scope, as opposed to local scope, of the entity's function, rather than its governmental as opposed to non-governmental character. *Id.* at n.47. At least one court has misapplied this point. See *Rivera Torres v. Junta de Retiro para Maestros*, 502 F. Supp. 2d 242, 259 (D.P.R. 2007); *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, 856 (D. Mich. 2004).

Eleventh Amendment’s basic purposes.<sup>274</sup> To avoid arbitrary results, if the outcome of a court’s arm of the state balancing test is ambiguous, the twin purposes of the Eleventh Amendment must guide the result.<sup>275</sup> Similarly, courts seeking to determine whether an entity is an organ must always keep the potential effect on foreign relations in mind. Courts have rarely done so. They have meticulously recited that the analysis is fact-intensive,<sup>276</sup> rather than a mechanical application of a strict test,<sup>277</sup> and that a certain factor’s presence or absence is not dispositive.<sup>278</sup> However, courts have made arbitrary calls on organ status when their tests have not conclusively pointed one way or the other.<sup>279</sup> Instead, when faced with an ambiguous result, courts must consider whether a contrary decision would justifiably affront a foreign government. This default inquiry will force courts to adhere to congressional purpose as closely as possible and further Congress’s subsidiary goal of encouraging uniform decisions.

*b. The Limits of the Arm of the State Analogy*

There are two discrete differences between the calculi required by the arm of the state and organ doctrines. The first is that an arm of the state is considered part of the state itself and an organ of a foreign state is only an agency or instrumentality of a foreign state. The FSIA reflects this fundamental difference in the definition of an agency or instrumentality by requiring that, in addition to its character as an organ or a majority-owned subsidiary of the foreign state, it must also be a “separate legal person.”<sup>280</sup> Thus, it is perfectly appropriate for courts listing the criteria for determining what constitutes an organ under the FSIA to have ignored or minimized the importance of an entity’s separate incorporation and its ability to sue or be sued or to hold and use property; indeed, if it were not a separate legal person, the entity would likely be part of the state itself.<sup>281</sup> In the Eleventh

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<sup>274</sup> *Hess*, 513 U.S. at 47.

<sup>275</sup> *Id.*

<sup>276</sup> *Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214 (JFK), 1998 U.S. Dist. LEXIS 1912, at \*10 (S.D.N.Y. Feb. 20, 1998).

<sup>277</sup> *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000).

<sup>278</sup> *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 641 (9th Cir. 2003) (noting that entity can be organ despite lack of one of factors).

<sup>279</sup> See *supra* notes 143-53 and accompanying text.

<sup>280</sup> 28 U.S.C. § 1603(b)(1) (2000 & Supp. V 2005).

<sup>281</sup> *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 n.17 (3d Cir. 2003).

Amendment context, however, separation from the state militates against the entity's being considered an arm of the state.<sup>282</sup>

The second distinction is that the language of the FSIA extends its benefits, in some form, to foreign states and political subdivisions thereof, and agencies and instrumentalities of both.<sup>283</sup> By contrast, the Eleventh Amendment limits itself to the state and its "arms."<sup>284</sup> For this reason, the arm of the state analysis often considers whether an entity is statewide in function or limited to some subsection of the state.<sup>285</sup> If the latter, the entity may more likely be related to a political subdivision, such as a municipality, and therefore not entitled to immunity.<sup>286</sup> Under the FSIA, inquiry into the functions of the putative organ may be appropriate, but the distinction between a statewide entity and one that acts only on a sub-national level is irrelevant.

These distinctions must be considered when analogizing the arm of the state doctrine to the organ question. However, despite the different contexts, we should still take away the relevance of the effect an adverse judgment will have on the public treasury of the foreign state, the irrelevance of the public activity inquiry, and the fundamental importance of using the purposes of the FSIA as the constant guidepost by which to measure organ decisions.

## 2. Applying the Alter Ego Lessons

The conceptual connection between veil piercing and organs is similarly clear; the former pierces the corporate veil and the latter the sovereign one. Unsurprisingly, to the extent control is a proper consideration for the organ question, both doctrines look at similar indicia of control that the greater entity exercises over its subordinate entity to determine whether to pierce the veil or to extend foreign-state status.<sup>287</sup> Thus, generally speaking, all of the veil-piercing factors

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<sup>282</sup> See *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 230 (3d Cir. 2006).

<sup>283</sup> See 28 U.S.C. § 1603(b)(2).

<sup>284</sup> See *Jinks v. Richland County*, 538 U.S. 456, 465-66 (2003).

<sup>285</sup> See *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 261 (4th Cir. 2005).

<sup>286</sup> See *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 245 (2d Cir. 2006).

<sup>287</sup> Compare *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003) (listing factors used to determine state control over potential organ), with *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988) (listing factors for corporate veil piercing).

are relevant, though sometimes in modified form,<sup>288</sup> in considering organs of foreign states.

There are, however, two distinct and fundamental differences between the two doctrines that temper the various factors’ direct application. First, veil piercing is a common-law doctrine designed to do justice. Courts developed the doctrine to address inequitable results, most often resulting from fraud.<sup>289</sup> Fraud is such a central concept in veil-piercing doctrine that it is sometimes sufficient by itself; some courts will pierce the veil if a parent corporation misuses the corporate form to effect a fraud, mislead creditors, or fraudulently transfer assets out of the corporation.<sup>290</sup> Even those courts that require more, usually call for some fraudulent or inequitable consequence of the corporation’s use of the corporate form before piercing the veil.<sup>291</sup> The organ prong within the definition of a “foreign state” serves entirely different purposes. It addresses the broad spectrum of entities with which a foreign government might choose to associate itself and to which Congress intended to extend FSIA protections. Fraud and its various appearances in veil piercing doctrine are not relevant to the FSIA’s concerns.

Second, veil piercing contradicts the very purpose of separate incorporation: limited liability. Courts are, therefore, reluctant to pierce the corporate veil except in extreme cases.<sup>292</sup> This prejudice should not apply to the organ analysis. Allowing an organ to pierce the sovereign veil, thus making use of its FSIA immunity, does not contradict the purposes of the doctrine itself; rather, Congress intended “agency or instrumentality” to be interpreted broadly and, thus, a broad definition of “organ” is appropriate.<sup>293</sup> For this reason, courts have noted that the level of control necessary to pierce the corporate veil is greater than that which implicates an organ of a

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<sup>288</sup> For example, references to overlapping board members must become whether the board members are government employees or appointees.

<sup>289</sup> See generally Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912) (discussing equitable history of veil piercing and indicating types of cases in which veil piercing should be applied).

<sup>290</sup> See Glynn, *supra* note 193, at 346.

<sup>291</sup> See *id.* at 345.

<sup>292</sup> While some commentators have called for the abolition of the doctrine because of its haphazard application, see generally Bainbridge, *supra* note 195, at least in theory, veil piercing is the exception, rather than the rule, see *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

<sup>293</sup> See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995).

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foreign state;<sup>294</sup> cases in which courts decline to pierce the corporate veil might still present appropriate cases for an organ designation.

This second distinction also means that the failure to maintain corporate formalities does not have the same importance. In the veil-piercing context, such failure is a prerequisite because, if it were only control that was needed, almost any wholly-owned corporation, whether the subsidiary of a parent or the property of an individual, would be ripe for veil piercing. In the FSIA context, the failure to maintain the corporate separateness of the state and the entity in question may be strong evidence of organ status, but its absence does not mean that the entity is not an organ.

As an example of how specific factors might be adapted to the FSIA context, we need only look to undercapitalization, one of the most commonly required factors in veil piercing.<sup>295</sup> In seeking to pierce, courts ask whether the relevant entity has maintained an appropriate level of capital. If not, courts often infer that the parent corporation was attempting to effect a fraud or improperly avoid liability by misusing the corporate form.<sup>296</sup> For potential organs, however, undercapitalization has more limited significance. If, for example, the state was obligated to provide the entire operating budget for the entity, the failure of the entity to maintain capital reserves evinces the state's liability for the judgment.

This example shows that the veil piercing factors cannot simply be applied by rote. They must be considered in the context of the FSIA and altered, if need be, to fit the contours of the state-entity relationship. Nevertheless, they remain useful in providing context and depth to the organ calculation.

### *B. A Cohesive Approach to the Organ Question*

The four lines of inquiry that both the arm of the state and alter ego doctrines follow analogize easily to the question of whether an entity is an organ of a foreign state. Courts must examine the tasks the government assigns the entity and the level of control it can and does exercise over the entity itself and its assigned tasks. They must also look at the legal relationship between the state and the entity, including how it is treated under local law, and whether and to what extent public funds are involved in the entity's business and in the transaction that is the subject of the lawsuit.

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<sup>294</sup> *Id.* at n.1.

<sup>295</sup> See *supra* note 244.

<sup>296</sup> See *Zaist v. Olson*, 227 A.2d 552, 559 (Conn. 1967).

To this end, I propose that courts ask the following questions: First, has the foreign state ceded any of its core and traditional sovereign powers to the entity? Second, are there sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury? Third, how does the foreign state treat the entity under local law and is that treatment significantly different from its treatment of other similar entities? Fourth, are similar entities in the United States and other foreign states given agency or instrumentality status? Finally, does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it exercise such extreme control?

### 1. Application of the Five Question Test

I submit that affirmative answers to any of the five questions I propose, in most cases, will justify organ status for FSIA purposes. The treatment of an entity that exercises sovereign power as a run-of-the-mill foreign corporation could reasonably be expected to annoy the foreign government. Similarly, if Australia decides that, under Australian law, an entity is cloaked in sovereign immunity, it might very well be justifiably affronted by a contrary decision by a U.S. court. The fact that an affirmative answer leads to organ status is not surprising; after all, each question was designed to get at whether justifiable affront would result, which as we have seen is the lynchpin to organ status.<sup>297</sup>

A negative answer to any one question, on the other hand, is not necessarily a bar. As we have seen, entities that do not exercise core sovereign power may still be entitled to treatment as organs.<sup>298</sup> If, for example, the foreign state has provided a blanket indemnity to the entity, then an adverse judgment would be paid out of the public treasury, leading to justifiable affront. Similarly, even if French law does not consider a commercial entity with limited financial ties to the French state part of the sovereign, treatment by U.S. courts of a similar German entity as an organ of the German state might require that same treatment for the French company.

This international comparative inquiry, in combination with the comparison of the entity to other similarly situated domestic entities, will assist in providing limits to my approach. If, for example, a socialist state considers itself the owner of every entity within its boundaries, the comparative inquiry will reveal that the entity in

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<sup>297</sup> See *infra* notes 302-34 and accompanying text.

<sup>298</sup> See, e.g., *supra* notes 113-16 (concluding that national university was organ).

question is treated just like any other entity — a fact that militates against organ status. Likewise, if no foreign sovereign thinks of its wineries as organs of the state, then France should not be offended if a U.S. court treated its wineries in the same manner.

It is, moreover, faithful to the structure of the FSIA to allow the exceptions to immunity to do the heavy lifting in weeding out cases inappropriate for immunity.<sup>299</sup> By structuring immunity as a rebuttable presumption, the FSIA contemplates that the procedural protections will be granted in many cases where immunity is not.<sup>300</sup> Many entities that would qualify for organ treatment under my proposal will be largely commercial enterprises, whose business would fall under the commercial activity exception to immunity.<sup>301</sup> Other suits will fall under the non-commercial tort exception, similarly stripping the entity of immunity.<sup>302</sup> The point is that the best way to fulfill the purposes of the FSIA is to extend its precepts, both procedural and substantive, to entities whose ties to the government are sufficiently close so that the lawsuit might risk offending a reasonable government. The FSIA nonetheless allows the exceptions to immunity to provide substantive relief for aggrieved plaintiffs under appropriate circumstances. Put in another way, avoiding increased interference with foreign relations is worth the extension of the FSIA's procedural protections, though not necessarily immunity, to entities with arguably more attenuated ties to the state. Thus, a foreign state would not lose the FSIA's procedural protections and its entitlement to presumptive immunity as a result of its decision to order its internal affairs in any given manner.<sup>303</sup>

a. *Has the Foreign State Ceded any of its Core and Traditional Sovereign Powers to the Entity?*

We first ask the question that the public activity test purports to ask, albeit in a more limited and direct manner.<sup>304</sup> Rather than looking at

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<sup>299</sup> See *supra* notes 67-73 and accompanying text.

<sup>300</sup> See *supra* notes 67-73 and accompanying text.

<sup>301</sup> See, e.g., *Boeing Co. v. Egyptair (In re Air Crash near Nantucket Island, Mass., on Oct. 31, 1999)*, 392 F. Supp. 2d 461, 468-69 (E.D.N.Y. 2005) (applying commercial activity exception to agency or instrumentality of Egypt); *Elliott v. British Tourist Auth.*, 986 F. Supp. 189, 192-93 (S.D.N.Y. 1997) (same to organ of England).

<sup>302</sup> See 28 U.S.C.A. § 1605(a)(5) (2008).

<sup>303</sup> See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001).

<sup>304</sup> This factor could also be analogized to the considerations in veil piercing regarding whether the parent uses the subsidiary to carry out its own affairs, rather than the subsidiary's having its own business.



the presence or lack of a public activity, we must look at whether the entity exercises a traditional sovereign function. This consideration’s applicability is self-explanatory. If a foreign state has ceded some of its sovereign powers to an entity, it is almost certain that the foreign state will be annoyed if a U.S. court does not consider that entity an organ. Nothing could be closer to the purposes of the FSIA than to ascribe organ status to entities that are acting in place of the foreign government itself.

The legislative history of the FSIA provides an example of this type of entity in its list of typical agencies and instrumentalities: a central bank.<sup>305</sup> If a foreign government sees fit to establish its central bank as a separate legal entity, there is no reason why such an entity should not be entitled to FSIA immunity to the same extent as the state itself. As noted above, a foreign state’s decision to structure its affairs in one way or another should not implicate the applicability of the FSIA. Other similar examples include states that task legally separate entities with regulating natural resources, (i.e., an oil company), regulating the financial markets,<sup>306</sup> investing in certain sectors of the economy (i.e., a development bank),<sup>307</sup> or caring for the security of the state (i.e., armed forces).<sup>308</sup> Whenever the government has delegated one of its core functions to a separate entity, extending the cloak of immunity over that entity is appropriate.<sup>309</sup>

*b. Are There Sufficient Financial Ties Between the Foreign State and the Entity such that any Award Would be Paid out of the Public Treasury?*

The arm of the state doctrine teaches us that nothing is more sacred to a sovereign than its purse strings.<sup>310</sup> Thus, although the FSIA does not share the Eleventh Amendment’s explicit concern, it is entirely appropriate to consider whether the judgment will ultimately be paid out of the foreign state’s public treasury. Just as in the Eleventh Amendment context, this does not mean that an entity would have to

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<sup>305</sup> See H. R. REP. NO. 94-1487, at 16 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

<sup>306</sup> See *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007).

<sup>307</sup> See *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003); H.R. REP. NO. 94-1487, at 16.

<sup>308</sup> *EIE Guam Corp.*, 322 F.3d at 640.

<sup>309</sup> See *supra* note 55.

<sup>310</sup> See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (citing cases).

show a guarantee from the government or trace any negative judgment directly to the state coffers. Indeed, it is perhaps even more important in the foreign state context, where governments and economies take on so many shapes and sizes, that courts investigate the practical effect of the judgment on that state's public treasury.

The FSIA's legislative history provides additional support to the relevance of this question by its reference to a state trading company as an example of a typical instrumentality.<sup>311</sup> Congress clearly anticipated that entities whose purpose is commercial in nature, but whose profits revert to the foreign state, would be entitled to FSIA protection. Justice Breyer's dissent in *Powerex* provides further support for this proposition, as well as another example of an entity that might qualify as an organ under this question: a power company.<sup>312</sup> Other examples might include a sovereign wealth fund or a state pension fund.

A variety of subsidiary factors can be imported from the arm of the state doctrine along with the overarching question. The first and simplest is whether the foreign state has guaranteed the debt of the subsidiary. Courts have already recognized the importance of this fact in determining organ status.<sup>313</sup> If there is no guarantee, the focus must turn to whether the practical effect of the judgment would be to draw money from the state treasury.<sup>314</sup> Indeed, *Powerex* has told us that it is crucial to determine whether an entity's profits go to the government.<sup>315</sup> Thus, courts must consider the government's ownership interest, regardless of whether it is direct or tiered.<sup>316</sup> Finally, courts must consider the source of the entity's funding: does it come from the government's coffers, via disbursements, a tax or some other method? If a court determines that an adverse judgment would be paid from the public treasury, either directly or as a practical matter, it would be difficult to justify a court's failure to extend the FSIA's procedural protections to the entity in question.

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<sup>311</sup> See H. R. REP. NO. 94-1487, at 16.

<sup>312</sup> See *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2424-26 (2007).

<sup>313</sup> See *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 210, 212 (3d Cir. 2003).

<sup>314</sup> See *supra* notes 277-78 and accompanying text.

<sup>315</sup> See *Powerex*, 127 S. Ct. at 2426.

<sup>316</sup> See *USX*, 345 F.3d at 209.

- c. *How Does the Foreign State Treat the Entity under Local Law and Is That Treatment Significantly Different from its Treatment of Other Similar Entities?*

This question also derives largely from the lessons of the arm of the state analysis,<sup>317</sup> but it also makes good sense. If a foreign state’s law and legal system treat an entity as part of the foreign state, it would be extremely likely that a court’s contradiction of that state’s treatment of the entity would offend that foreign state. Moreover, while the organ question is one of federal law, the domestic law of the foreign state is better able to address the specific economic and corporate structures that are prevalent and the specific state-entity relationships that are peculiar to that state.

Aside from those few instances in which local law has a similar criterion to organ status under the FSIA, there is a variety of questions that we can borrow from the Eleventh Amendment analysis and add to those that the courts already consider.<sup>318</sup> Courts should begin by determining whether the government created the entity and, if so, examine the act(s) that created it.<sup>319</sup> Or, if the entity was initially private but later nationalized, the relevant inquiry will be the circumstances surrounding its acquisition.<sup>320</sup> Courts should turn to other statutory, judicial, and administrative treatment of the entity. For example, if the foreign state deems the entity a “public corporation” or immunizes it from taxation, those facts would argue for the entity’s sovereign character.<sup>321</sup> Similarly, if the state grants the entity special privileges or exclusive rights, the entity is likely an organ of the state.<sup>322</sup> The court could also look at whether the entity’s founding documents note its quasi-governmental character or refer to its connection to the state.

This potentially broad grant of sovereign status is checked by comparative analysis. Once the court determines how local law

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<sup>317</sup> See *supra* notes 226-33 and accompanying text.

<sup>318</sup> Though as discussed above, we sometimes need to adapt those factors to the changed factual circumstances.

<sup>319</sup> See, e.g., *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (listing this as one of factors in FSIA context); *Lambert v. Kenner City*, 2005 U.S. Dist. LEXIS 357 (D. La. Jan. 5, 2005) (looking at foundation state statute in “arm of the state” context).

<sup>320</sup> See *USX*, 345 F.3d at 209-10.

<sup>321</sup> See *Sociedad Naviera Box Marine, S.A. v. S. Jersey Port Corp.*, No. 88-1631, 1988 U.S. Dist. LEXIS 10323, at \*23 (E.D. Pa. Sept. 12, 1988).

<sup>322</sup> See *Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 279 (5th Cir. 2007) (citing *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845 (5th Cir. 2000)).

handles the entity, it should compare and contrast its treatment with the treatment of any other similar entities in the foreign state. If the domestic law treats all similar entities as part of the state, this fact may have little weight in determining whether a reasonable state would be affronted. For example, in a socialist state, the fact that the state is deemed to own all of a particular type of entity does not mean that those entities are, without more, organs of the state.<sup>323</sup>

Conversely, the foreign state's treatment of an entity as a part of the government or a statutory reference to the entity as a public corporation, if these characterizations are not true of other similarly situated entities, is strong evidence that the entity in question should be considered an organ. Alternatively, if the foreign state treats the entity in a significantly different manner than other public entities, this too might be evidence that courts need not grant it sovereign status. This method helps ascertain the likelihood that a foreign state would be justifiably offended by a U.S. court's failure to spread the cloak of sovereign immunity over the entity.

*d. Do U.S. Courts Give Agency or Instrumentality Status to Similar Entities in the United States and Other Foreign States?*

The justification for this line of inquiry should also be readily apparent. Here, we address the possibility for interference with foreign relations by the appearance of favorable treatment for entities in the United States itself or with specific other countries. *Powerex* provides an apt example. The Canadian power company at issue was "not meaningfully different from ordinary municipal electricity distributors, the TVA, or any foreign 'nationalized' power producers and distributors, such as Britain's former Central Electricity Generating Board or Electricite de France."<sup>324</sup> It is not hard to imagine that Canada would be justifiably offended that the entity to which it assigned its interest under a treaty with the United States would be treated as a run-of-the-mill for-profit corporation, where similar entities within and without the United States would be considered part of the government.

It is also difficult to fault Justice Breyer's implicit reasoning that the vagaries of a foreign state's arrangement with an entity, perhaps as required by the political necessities of the moment, should not be dispositive of its entitlement to agency or instrumentality status. If U.S.

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<sup>323</sup> See *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1997).

<sup>324</sup> *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2424 (2007).

courts afford other similar entities in other states the special treatment that the FSIA allows, why not extend that special treatment to the entity in question? For instance, Justice Breyer took issue with the Ninth Circuit’s emphasis on Powerex’s not being subject to all of the provincial regulations to which other governmental departments were subject.<sup>325</sup> By implication, it is the broad picture of the entity and how it fits into the foreign state’s political and regulatory scheme that is important when one engages in this type of comparative analysis.

*e. Does the Foreign State Control How the Entity Conducts its Business Beyond What is Customary in that State and, If Not, Can It?*

The final and most complicated and varied inquiry delves into the level of control that the foreign state can and does exercise over the entity. While this was supposedly the purpose of the balancing test,<sup>326</sup> we have seen that those factors have been peeled off, layer by layer, in the previous questions. We therefore borrow heavily from the alter ego theory of veil piercing — after all, control is its lodestar, albeit at a much higher level than we would find desirable under the FSIA.<sup>327</sup> The legislative history mentions various entities that might only qualify as organs under this prong, including a shipping line, an airline, a steel company, or a government procurement agency, all of which might seem ordinary businesses by other measures.<sup>328</sup>

Courts could look at any of the various criteria developed in the extensive alter ego precedent and literature. While there are too many to list here, the following factors are particularly relevant to the question of control in these circumstances:

- Does the government treat the entity’s assets as its own?<sup>329</sup>
- Are the entity’s employees civil servants?<sup>330</sup>
- Does the government appoint or have the right to veto board members?<sup>331</sup>

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<sup>325</sup> *Id.* at 2426.

<sup>326</sup> See *supra* notes 109-37 and accompanying text.

<sup>327</sup> See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995).

<sup>328</sup> See H. R. REP. NO. 94-1487, at 16 (1976), as reprinted in 1976 U.S.C.A.N. 6604, 6614.

<sup>329</sup> See *Assoc. Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813-14 (Cal. Ct. App. 1962); *Bainbridge*, *supra* note 194, at 551.

<sup>330</sup> See *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 213-14 (3d Cir. 2003).

<sup>331</sup> See *Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2423 (2007); *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico*, 322 F.3d 56, 65 (1st

- Does the government supervise the entity's day-to-day operations?<sup>332</sup>
- Can the government circumscribe the entity's activities?<sup>333</sup>
- Does the government deal at arm's length with the entity?<sup>334</sup>
- Is the government the entity's only source of business?<sup>335</sup>
- Did the entity undertake the activity that provides the basis for the lawsuit on behalf of the government or at its insistence?<sup>336</sup>

At its core, this open-ended analysis must determine whether the foreign government is sufficiently involved in and responsible for the activities of one of its citizen entities to jeopardize American foreign relations with that state, if a court were not to extend the FSIA's protections to the entity in question.

Consider the following entity: it was initially owned by the government directly, but was later transferred to a holding company as part of a restructuring of all governmental holdings; all profits revert directly to the government treasury; all property owned by the entity is held on behalf of and for the benefit of the state; the entity can enter into contracts on behalf of the state; the government appoints all board members; and the employees of the entity are paid directly out of state coffers.<sup>337</sup> Perhaps this level of control is insufficient to find that the entity is the alter ego of the government, but that government would be justifiably affronted were a U.S. court to fail to afford it FSIA protections.

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Cir. 2003).

<sup>332</sup> See, e.g., *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) (looking for pervasive control in FSIA context); *GE Capital Corp. v. MHPG, Inc.*, No. 03-0833B, 2006 Mass. Super. LEXIS 392, at \*10-11 (Super. Ct. June 12, 2006) (looking for same in alter ego context).

<sup>333</sup> See *Fresenius*, 322 F.3d at 62; *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985).

<sup>334</sup> See *Am. Fuel Corp. v. Utah Energy Dev. Corp.*, 122 F.3d 130, 134 (2d Cir. 1997); *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 313 (Conn. App. Ct. 2002).

<sup>335</sup> See *Jon-T Chems., Inc.*, 768 F.2d at 691-92.

<sup>336</sup> See *Assoc. Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 814 (Cal. Dist. Ct. App. 1962).

<sup>337</sup> See *Vivas v. Boeing Co.*, No. 06 C 3566, 2007 U.S. Dist. LEXIS 61625, at \*5 (D. Ill. Aug. 21, 2007).

## 2. Courts Must Always Default to the Purposes of the FSIA

There will be situations where these specific inquiries do not reveal a clear answer. Then, just as in the Eleventh Amendment context, courts must default to the underlying purpose of the FSIA: to prevent interference with foreign relations by making it difficult to sue foreign governments and their agencies and instrumentalities. When faced with these closer calls,<sup>338</sup> courts must carefully consider the effect their decision will have on the conduct of foreign relations and determine whether that effect will be sufficient to justify extending the foreign state’s cloak over the entity in question.

### CONCLUSION

Courts have been and will continue to be faced with an increasingly wide variety of entities that assert entitlements to the protections of the FSIA.<sup>339</sup> Those entities and the governments to which they profess a connection, as well as the parties who do business with them, have a strong interest in the development of a more robust organ framework. The tests that the courts have created have paid little attention to the purposes of the FSIA.<sup>340</sup> The courts codified them from descriptions of specific examples that do not necessarily translate easily to all factual situations.<sup>341</sup> To make matters worse, the results of the application of these tests have been arbitrary.<sup>342</sup>

The problem with the organ analysis has always been how to achieve the flexibility that Congress requires in its definition of “agency or instrumentality” and, therefore, “organ” without sacrificing the interests of uniformity and predictability. Adapting the arm of the state and alter ego doctrines to the organ calculus addresses that conflict. It replaces an ad hoc, organic list of factors with various lines of inquiry that help ascertain whether Congress’s interest in flexibility will be served under the facts of a given case. To adhere more closely to those lines, these analogous inquiries provide hundreds of cases considering situations arising in myriad circumstances, which will both inform the court’s resolution of the claim before it and ensure as great an attention to uniformity as possible. Only by capturing the broadest possible picture of the relationship between the entity and

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<sup>338</sup> As the Ninth Circuit notes that it was in *Dole*, before denying organ status. See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001).

<sup>339</sup> See *supra* note 156.

<sup>340</sup> See *supra* notes 87-166 and accompanying text.

<sup>341</sup> See *supra* notes 122-25 and accompanying text.

<sup>342</sup> See *supra* notes 134-37, 142-48 and accompanying text.

the foreign state can a court resolve the tension between the maintenance of proper foreign relations and the uniform and predictable resolution of claims against foreign states.