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Matthew Engellenner

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THE DISADVANTAGED PLAINTIFF: IS IT TIME TO REVISIT THE FOREIGN SOVEREIGN IMMUNITIES ACT?

I. INTRODUCTION

The Foreign Sovereign Immunities Act of 1976¹ (“FSIA”) provides the exclusive means for attaining jurisdiction over a foreign sovereign and its agencies and instrumentalities in U.S. courts.² The FSIA provides qualified foreign states a presumption of immunity from jurisdiction, attachment, and execution.³ From these blanket rules of immunity, the FSIA establishes limited exceptions based on a restrictive theory of immunity that can subject foreign states to the jurisdiction of U.S. courts for claims arising out of commercial conduct.⁴

Unfortunately, the FSIA has been exploited by foreign sovereigns seeking to avoid liability for almost all conduct.⁵ In the thirty years since its enactment, foreign sovereigns have increasingly utilized discrete corporate structures to conduct their commercial affairs.⁶ Despite their commercial characteristics and legally distinct personalities, these

¹ Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

² See *id.* (codifying sovereign immunity law in United States); see also *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443 (1989) (“[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States].”)

³ See 28 U.S.C. §§ 1605-1611 (explaining immunity protections provided to qualified foreign states); see also *Republic of Austria v. Altmann*, 541 U.S. 677, 726 (2004) (discussing initial presumption of immunity under FSIA).

⁴ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (explaining restrictive theory of immunity and its history in U.S. jurisprudence). The restrictive theory of immunity permits suits arising out of a sovereign’s commercial conduct. *Id.*; see also *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1124 (9th Cir. 2010) (describing statutory construction of FSIA); H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (stating first objective of FSIA’s enactment was codifying restrictive principles of sovereign immunity).

⁵ See *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983) (claiming sovereign immunity to avoid liability for government expropriation of assets); *De Letelier v. Republic of Chile*, 748 F.2d 790, 797-98 (2d Cir. 1984) (claiming sovereign immunity to avoid liability for act of state terrorism); *EM Ltd. v. Republic of Arg.*, 720 F. Supp. 2d 273, 275 (S.D.N.Y. 2010) (claiming sovereign immunity to avoid liability for defaulted sovereign bonds), *vacated on other grounds sub nom.*, *NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172 (2d Cir. 2011).

⁶ See *First Nat’l City Bank*, 462 U.S. at 624 (discussing foreign sovereigns’ increasing use of corporate form and its utility to modern governments).

corporations enjoy a presumption of immunity under the FSIA.⁷ By attaching the presumption of immunity to their commercial corporations, foreign sovereigns may extend sovereign immunity to their commercial counterparts while limiting their liability for commercial acts.⁸

This Note addresses the confusion in the courts with respect to when a legally separate corporate entity should be considered an agency or instrumentality of a foreign state and discusses the inequitable effects that result from the broad presumption of immunity afforded to qualified corporate entities.⁹ Part II traces the evolution of sovereign immunity in the United States, from its origin at common law to its statutory codification in the FSIA.¹⁰ Furthermore, Part III explores the current legal framework for adjudicating claims against foreign sovereigns and the presumption of immunity the FSIA affords qualified corporate entities.¹¹ Additionally, it explores the procedural disadvantages for plaintiffs resulting from the FSIA's presumption of immunity as well as the structural contradiction that allows corporate defendants to enjoy sovereign characteristics for the purpose of jurisdictional immunity, while retaining a presumption of legal separateness for the purpose of limited liability.¹² Finally, Part IV of this Note discusses several reform proposals that would restore the balance between parties and simplify the rules governing liability of foreign corporations and their parent governments.¹³

II. HISTORY

A. Background

The Sovereign Immunities Doctrine is derived from the English

⁷ See Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 3 (2008) (observing sophistication of modern state owned corporations); see also Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 J. TRANSNAT'L L. & CONTEMP. PROBS. 3, 61 (2010) (discussing how state-owned entities no longer "merely the outward projection of state power"). Today's state-owned enterprises have evolved into major players in the international financial and commercial marketplace. See Backer, *supra*, at 61 (noting changed aspects of state-owned enterprises).

⁸ See Riblett, *supra* note 7, at 18 (discussing foreign sovereign use of legally separate entities to structure commercial acts and limit liability).

⁹ See *infra* Part III.A-B.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part III.B.

¹³ See *infra* Part IV.

common-law concept that “the king can do no wrong.”¹⁴ The theory of absolute sovereign immunity that came to dominate Eighteenth and Nineteenth Century United States jurisprudence is based on this concept.¹⁵ Absolute sovereign immunity is based on the theory that sovereign states should not be subject to suit in U.S. courts absent consent.¹⁶ The Supreme Court affirmed absolute sovereign immunity in the seminal case of *The Schooner Exchange v. McFaddon*.¹⁷ The *Schooner Exchange* Court considered whether the particular circumstances entitled a French naval vessel to immunity from suit in U.S. courts.¹⁸ In an opinion written by Chief Justice John Marshall, the Court held that the principles of “perfect equality and absolute independence of sovereigns, and [a] common interest impelling them to mutual intercourse” dictated that armed public vessels were immune from jurisdiction.¹⁹ Nonetheless, Chief Justice Marshall posited that certain exceptions to the rule of absolute immunity might exist in situations where the sovereign had engaged in commercial conduct.²⁰

¹⁴ See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (discussing origins of doctrine of sovereign immunity). The Court reasoned that the doctrine of sovereign immunity flowed from the universal implied consent of nations. *Id.*; see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (stating sovereign immunity is “a matter of grace and comity”); H.R. REP. NO. 94-1487, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606 (recognizing absolute sovereign immunity was a doctrine of international law). Generally, the rationale for sovereign immunity was to avoid adjudication that might offend a foreign nation or frustrate the executive branch in its international dealings. See Jane H. Griggs, Note, *International Law—The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387, 389 n.11 (1998) (discussing traditional rationale behind U.S. courts’ adoption of absolute immunity). Over time, the rationale for extending sovereign immunity has evolved to focus on the importance of promoting comity and observing the customs of international law. *Id.*

¹⁵ See Troy Daniels, *An Analysis of the United States Foreign Sovereign Immunities Act*, 4 J. INT’L L. & PRAC. 175, 176 (1995) (describing doctrine of absolute immunity and history of sovereign immunity in United States).

¹⁶ See *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . .”).

¹⁷ 11 U.S. (7 Cranch) 116, 147 (1812) (holding U.S. courts could not exercise jurisdiction over armed naval vessel of foreign sovereign).

¹⁸ See *id.* at 118 (explaining facts of case). The *Schooner Exchange*, a commercial vessel originally owned by U.S. citizens, was seized by Napoleon Bonaparte. *Id.* at 117. The Exchange was then armed and re-commissioned as a public vessel by the French government. *Id.* at 117-18. While taking safe harbor in the U.S. port of Philadelphia due to foul weather, plaintiffs arrested and detained the vessel pursuant to process of attachment, claiming the vessel was illegally seized and that the U.S. had jurisdiction over the case. *Id.* at 118-19.

¹⁹ See *id.* at 137, 147.

²⁰ See *id.* at 142 (discussing distinction between public and private acts of state). Chief Justice Marshall explained that the Court’s ruling should only be applicable to armed ships of war, suggesting that the distinction between armed ships of war and commercial vessels might warrant disparate treatment in cases of immunity. *Id.* at 144.

In Chief Justice Marshall's opinion in *Bank of the United States v. Planters' Bank of Georgia*,²¹ the Court invoked one of these exceptions, holding that state-owned corporations were not necessarily entitled to sovereign immunity.²² In *Planters' Bank*, the Court reasoned that when the State of Georgia incorporated its bank, the bank became a separate legal identity and, thus, voluntarily waived its right to invoke the privileges of sovereign immunity.²³ Although the Court's decision did not rely on the commercial activity concept initially discussed in the *Schooner Exchange*, the application of the "separate legal entity" rule in the sovereign context theoretically limited the reach of absolute immunity.²⁴

However, due in part to the Court not addressing the application and limitation of the separate entity rule nor elaborating further on the commercial activities exception presented in *The Schooner Exchange*, the theory of absolute immunity prevailed in the lower courts for the better part of a century.²⁵ Indeed, in *Berizzi Bros. Co. v. The Pesaro*,²⁶ the Supreme Court explicitly endorsed the theory of absolute immunity.²⁷ The Court stated that the *Pesaro*, a commercial vessel owned and operated by the Italian government and engaged in wholly commercial activities, should enjoy the same immunity as an armed ship of war, such as the *Schooner*

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual.

Id. at 145.

²¹ 22 U.S. (9 Wheat.) 904 (1824).

²² See *id.* at 907-08 (holding government engaged in trade takes the character of the business of which it transacts).

²³ See *id.* ("The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character.").

²⁴ See William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 543-44 (1991) (discussing history of separate entity rule and impact on absolute immunity doctrine).

²⁵ See Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 554 (2010) (discussing United States courts' adherence to absolute immunity theory).

²⁶ 271 U.S. 562 (1926).

²⁷ See *id.* at 574 (holding public ships immune from jurisdiction in United States courts regardless of nature of conduct).

Exchange.²⁸ The *Pesaro* Court held that sovereign governments should be immune from suit in U.S. courts irrespective of the nature of their activities, thus eroding any commercial activity exception envisioned by Chief Justice Marshall a century earlier in *Schooner Exchange*.²⁹

While the absolute immunity theory prevailed, the “separate entity rule” applied in *Planters’ Bank* seemed to endure alongside it, creating significant confusion and contradiction among the courts.³⁰ This confusion was compounded by the fact that the courts viewed sovereign immunity as a matter of national interest best left to the executive branch because of a decision’s potential impact on international relations.³¹ Accordingly, when confronted with questions of sovereign immunity, the courts deferred to “suggestions” issued by the executive branch in accordance with the unique diplomatic objectives presented in the case.³² In effect, these executive suggestions were binding on the court.³³

Initially, the executive branch issued suggestions in accordance

²⁸ See *id.* at 569-74 (reasoning government owned commercial vessels served similar public purpose as ships of war).

²⁹ See *id.* at 574.

The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are.

Id.

³⁰ See Hoffman, *supra* note 24, at 542-43 (discussing development of separate entity rule as balance to absolute immunity).

³¹ See *United States v. Lee*, 106 U.S. 196, 209 (1882) (stating questions of immunity required judicial branch to follow actions of political branch). The Court regarded the political branch as best suited to resolve questions of immunity because “the decisions of which, as they might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war.” *Id.*

³² See *Republic of Mex. v. Hoffman*, 324 U.S. 30, 32-34 (1945) (discussing need for judicial deference to the executive branch in cases involving foreign relations); see also *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (addressing need to avoid embarrassing political branch by assuming antagonistic jurisdiction); *Compania Espanola de Navegacion Maritima, S.A., v. The Navemar*, 303 U.S. 68, 74 (1938) (reasoning courts must decline jurisdiction in cases where executive branch recognizes immunity).

³³ See William A. Dobrovir, *A Gloss on the Tate Letter’s Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1, 1 (1968) (discussing conclusive effect given by courts to “suggestions of immunity” issued by executive branch).

with the absolute theory of immunity.³⁴ However, the United States began to retreat from the absolute theory of immunity in the case of the *Republic of Mexico v. Hoffman*,³⁵ where the Supreme Court held that a sovereign vessel, operated by a privately-owned Mexican company engaged in commercial activities, was not entitled to immunity from suit.³⁶ The Court held that no clear policy or common law precedent existed for affording immunity to a sovereign based on title alone.³⁷ Furthermore, the Court stated that the State Department's refusal to certify immunity for the Mexican government-owned vessel was indicative of a "national policy" against affording immunity based on title.³⁸ The Court's holding shifted the focus of sovereign immunity from legal title to possession and nature of conduct, thus signaling a shift towards a restrictive theory of foreign sovereign immunity, which permits suits arising out of a foreign state's commercial activities.³⁹

The *Hoffman* Court's adoption of the restrictive theory was officially endorsed in a 1952 letter from State Department Advisor Jack Tate (the "Tate Letter").⁴⁰ Despite the fact that the Tate Letter signaled a distinct policy shift, the executive branch's determinations and suggestions with respect to sovereign immunity essentially remained political and often inconsistent with the rationale of the restrictive theory espoused in the Tate Letter.⁴¹ In recognition of these inconsistencies and the inequitable effects

³⁴ See Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 168 (2001) (discussing executive branch's adherence to principles of absolute immunity prior to enactment of FSIA); see also *Hoffman*, 324 U.S. at 42 (holding courts should not deny immunity where government has certified foreign defendant's petition).

³⁵ 324 U.S. 30 (1945).

³⁶ See *id.* at 37-38 (holding where State Department declined to certify immunity, state-owned vessel not entitled immunity); see also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 11 (D.D.C. 1998) (discussing historical shift from absolute immunity to restrictive theory). The Court suggests that the retreat from absolute immunity, in favor of the restrictive theory, developed in response to the rise of Communism and the increasing presence of government and government-owned corporate entities in international commerce. *Id.*

³⁷ See *Hoffman*, 324 U.S. at 38 ("We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government . . . has not seen fit to recognize.").

³⁸ See *id.* at 36-38 (discussing the impact of the State Department's refusal to certify immunity).

³⁹ See *id.* at 38 (noting absent precedent for immunity based on title, courts looked to possession and conduct).

⁴⁰ Letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to Acting Attorney General, The Tate Letter (May 1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976).

⁴¹ See Narver, *supra* note 34, at 169 (noting political influence on sovereign immunity

of the judiciary's exposure to diplomatic influences, Congress enacted the FSIA to "transfer the determination of sovereign immunity from the executive branch to the judicial branch . . . [to] assur[e] litigants that these . . . decisions are made on purely legal grounds and under procedures that insure due process."⁴²

B. The FSIA

In the House Report on the matter, Congress cited four objectives that it designed the FSIA to remedy.⁴³ The first objective was to codify a restrictive theory of sovereign immunity that would limit immunity to only suits involving a foreign state's public acts, and providing no such protection for suits based on the commercial or private acts of states.⁴⁴ The second objective was to ensure that these restrictive principles were applied in litigation before United States courts with the goal of making uniform and consistent decisions based strictly on legal grounds and without interference from diplomatic or political pressures.⁴⁵ The third objective was to provide a statutory procedure for serving process and obtaining jurisdiction over a foreign state.⁴⁶ Finally, the fourth objective was to

matters).

⁴² See H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606 (explaining Congress's objectives in enacting FSIA). Congress believed that by transferring immunity decisions to the courts, "[t]he Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." *Id.* Similarly, Congress acknowledged the inequity that occurred prior to the enactment of the FSIA, where private parties dealing with a foreign government entity could not "be certain that his legal dispute with a foreign state [would] not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." *Id.* at 9, reprinted in 1976 U.S.C.C.A.N. at 6607.

⁴³ See *id.* at 7, reprinted in 1976 U.S.C.C.A.N. at 6605 ("The bill . . . [will] accomplish four objectives.").

⁴⁴ See *id.* (describing restrictive principle of sovereign immunity and making its codification primary objective of FSIA).

⁴⁵ See *id.* at 7-8, reprinted in 1976 U.S.C.C.A.N. at 6605-06 (discussing objectives to be realized with enactment of FSIA).

⁴⁶ See *id.* at 8, reprinted in 1976 U.S.C.C.A.N. at 6606 (discussing need for statutory procedure for service of process and exercising jurisdiction). Prior to enactment of the FSIA, litigants were required to seize and attach the property of a foreign sovereign in order to obtain jurisdiction. See *id.* at 26-27, reprinted in 1976 U.S.C.C.A.N. at 6625-26 (explaining rationale for prohibiting attachment for purpose of obtaining jurisdiction). Under its current construction, the FSIA realizes Congress's goal by merging personal jurisdiction with subject matter jurisdiction where service of process is proper. *Id.*; see also Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 677-78 (2005) (noting subject matter jurisdiction with service of process sufficient to establish personal jurisdiction).

empower judgment creditors with rights of execution.⁴⁷

While the FSIA has helped to add clarity to the law and provide certainty with respect to specific areas previously prone to judicial conflict, the FSIA has also caused much confusion and its application can lead to inequitable results.⁴⁸ In particular, the FSIA's definition of "foreign state" has entitled a broad group of legally separate entities with a presumption of immunity that is at odds with the separate entity rule.⁴⁹ This presumption of immunity provides sovereign defendants with a number of advantages that are not available to other market participants.⁵⁰ Similarly, the presumption of immunity allows state-owned companies to enjoy dual identities under the FSIA: one of sovereign characteristics with the benefit of jurisdictional immunity, and another of legal separateness with the benefit of limited liability.⁵¹

1. The Presumption of Immunity

The FSIA defines the foreign state to include the sovereign's

⁴⁷ See H.R. REP. NO. 94-1487, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 6606 (showing Congress's intent to provide plaintiffs with statutory mechanism for enforcing judgments). Prior to enactment of the FSIA, the restrictive principles of sovereign immunity were applied only to jurisdictional immunity, while foreign states enjoyed absolute immunity from execution. *Id.* This left successful litigants without a remedy to enforce their judgments and ensure the satisfaction of their judgments in the court system. *Id.*

⁴⁸ See Riblett, *supra* note 7, at 2 (noting confusion experienced by courts confronted with questions involving agency and instrumentality status); *see also* *De Letelier v. Republic of Chile*, 748 F.2d 790, 792 (2d Cir. 1984) (expressing regret that current structure of FSIA can leave litigants a "right without a remedy").

⁴⁹ See Hoffman, *supra* note 24, at 550 (addressing effect of FSIA and presumption of immunity on separate entity rule). Prior to enactment of the FSIA, "the courts failed to develop a uniform standard for the exceptional case in which a separate entity enjoys immunity." *Id.* Some courts relied solely on incorporation as grounds for denying immunity, disregarding the nature or purpose of an entity's acts. *See Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 908 (1824) (holding incorporation of state bank established a voluntary waiver of sovereign immunity). Other courts applied a restrictive theory by looking at the purpose or nature of the act. *See Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359-60 (2d Cir. 1964) (comparing application of "purpose test" with "nature of act" test). Congress sought to resolve this disharmony by enacting the FSIA, which sacrificed the separate entity rule in favor of a presumption of immunity to all state owned entities. *See Hoffman, supra* note 24 at 550-51 (discussing presumption of immunity afforded to state owned entities under FSIA).

⁵⁰ *See Hoffman, supra* note 24, at 571-74 (illustrating procedural advantages available to foreign sovereign and agencies); *see also infra* Part III.B (discussing plaintiff's disadvantage when litigating against foreign sovereign).

⁵¹ *See Riblett, supra* note 7, at 21 (discussing dual protections of both corporate separateness and immunity).

political subdivision and its agencies and instrumentalities.⁵² This definition allows foreign entities to avail themselves of the same immunity protections afforded to the sovereign state itself under the FSIA.⁵³ For the purposes of the FSIA, an “agency or instrumentality” is any separate legal entity which can be properly viewed as either an organ of the foreign state (“organ status”) or other such entity in which the foreign state owns a majority ownership interest (“majority ownership test”).⁵⁴

Of this two-pronged approach, courts have often relied on the majority ownership test for determining agency/instrumentality status.⁵⁵ Although majority ownership appears to be a relatively straightforward inquiry, the analysis is complicated when state ownership is tiered between intermediary agencies, whereby the state relies not on a showing of direct ownership but instead on the equity interests of another entity of whom the foreign state is the direct owner.⁵⁶ In *Dole Food Co. v. Patrickson*,⁵⁷ however, the Supreme Court held that a foreign state itself must maintain a direct majority share in the corporation to qualify as an agency or instrumentality of the state and avail itself of the immunity afforded under the FSIA.⁵⁸

⁵² 28 U.S.C. § 1603 (1976).

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means 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

Id.

⁵³ See *id.* This extension of immunity is based on Congress’s recognition of the growing use of independent government agencies in carrying out the public functions of state governments. See H.R. REP. NO. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 (recognizing American citizens increasingly coming into contact with foreign states and state-owned entities).

⁵⁴ See 28 U.S.C. § 1603(b)(2) (defining “agency or instrumentality” under FSIA).

⁵⁵ Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 16 (2008) (discussing defendant’s preference for qualification for agency/instrumentality status under ownership requirement).

⁵⁶ *Id.* at 17. The majority ownership criteria under the § 1603 definition of agency or instrumentality does not expressly foreclose on the possibility that an entity may qualify for immunity based on a showing that the foreign state proper retains a majority interest in one of its minority shareholders. See *O’Connell Mach. Inc., v. M.V. “Americana,”* 734 F.2d 115, 116 (2d Cir. 1984) (finding Italian government’s “double-tiered” ownership of entity qualifies entity under “majority ownership test”).

⁵⁷ 538 U.S. 468 (2003).

⁵⁸ See *id.* at 474 (“[O]nly direct ownership of a majority of shares by the foreign state

However, the *Dole* Court never addressed the organ status of the entities at issue under the second prong of the FSIA definition.⁵⁹ Instead, the Court's opinion focused exclusively on qualification under the majority ownership prong.⁶⁰ In holding that "a foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state," the Court strongly suggests an inquiry into organ status would be irrelevant.⁶¹

Nonetheless, the Court's holding in *Dole* has limited the reach of sovereign immunity under the majority ownership test, and because the opinion did not explicitly address organ status, qualifying as an "organ of the state" under the second prong of the FSIA definition may provide entities with an alternative basis for immunity.⁶² Unlike the majority ownership test, no bright line test for determining organ status has emerged in FSIA jurisprudence.⁶³ While the legislative history suggests that Congress intended organ status to be flexible, the examples provided in the House Report discuss commercial entities together with independent government agencies, which has led to confusing and conflicting treatment in the lower courts.⁶⁴

The Ninth Circuit held that in determining an entity's "organ status," the ultimate question is "whether the entity engages in a public

satisfies the statutory requirement").

⁵⁹ See Riblett, *supra* note 7, at 17 (discussing impact of *Dole* on agency and instrumentality status analyses).

⁶⁰ See *supra* note 58 and accompanying text (demonstrating *Dole* simplified agency and instrumentality status analyses to question of ownership and not control).

⁶¹ *Dole*, 538 U.S. at 480; see *Allen v. Russian Fed'n*, 522 F. Supp. 2d 167, 184-85 (D.D.C. 2007) (holding after *Dole*, agency and instrumentality analyses are based on evidence of ownership, not control). The court stated that the petitioner's argument that Russian Federation should qualify for immunity as an "agency or instrumentality" based on evidence of control and not ownership was "nothing more than a frontal assault on the Supreme Court's decision in *Dole*." *Id.*; see also Riblett, *supra* note 7, at 17 (interpreting *Dole* as eliminating need for organ status inquiry).

⁶² 28 U.S.C. § 1603(b)(2) (2006); see also Granne, *supra* note 55, at 16-17 (noting entities failing to qualify for immunity under ownership requirement must rely on organ status).

⁶³ See Granne, *supra* note 55, at 20-21 (explaining balancing tests courts use to determine organ status).

⁶⁴ H.R. REP. NO. 94-1487, at 15-16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

Id.

activity on behalf of the foreign government.”⁶⁵ The United States District Court for the Eastern District of Pennsylvania determined organ status using a balancing test based on five relevant criteria in *Supra Medical Corp. v. McGonigle*:⁶⁶

(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.⁶⁷

Although many courts have interpreted *Dole* to limit immunity qualification under agency and instrumentality status to a majority ownership test, other jurisdictions recognize immunity under the organ test and apply the “McGonigle test.”⁶⁸ The Supreme Court has not yet defined “organ of the state,” but Justice Breyer’s dissenting opinion in *Powerex Corp. v. Reliant Energy Services, Inc.*⁶⁹ discusses a balancing test similar to the McGonigle test.⁷⁰

⁶⁵ *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds*, *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

⁶⁶ 955 F. Supp. 374 (E.D. Pa. 1997).

⁶⁷ *Id.* at 379 (citing *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996)).

⁶⁸ *See Allen v. Russian Fed’n.*, 522 F. Supp. 2d 167, 184 (D.D.C. 2007) (interpreting *Dole* decision to limit immunity under agency/instrumentality status to showing of direct majority ownership). *But see Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 279 (5th Cir. 2007) (applying “McGonigle test” to determine organ status); *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F. Supp. 2d 199, 211(D.Del 2007) (applying seven-part balancing test similar to “McGonigle test” to determine organ status).

⁶⁹ 551 U.S. 224 (2007).

⁷⁰ *Id.* at 245-48 (Breyer, J., dissenting) (applying a balancing test to determine organ status). Nevertheless, the Court dismissed the appeal based on a procedural technicality, ruling that the appellate court lacked jurisdiction over the district court’s decision to remand the case to state court. *Id.* at 238 (majority opinion). From this decision, Justice Breyer dissented, stating:

In my view . . . Powerex is “an organ” of the Province of British Columbia

. . . [It is] an entity that all apparently concede is governmental in nature. . . .

[It] has a board of directors, all of whom are appointed by British Columbia’s government. . . .

. . . .

. . . British Columbia’s fiscal control statute refers to Powerex as a “government body.” . . . If Powerex earns a profit, that profit must be

Nonetheless, both the ownership and organ tests serve to immunize a broad range of entities regardless of their separate legal status.⁷¹ Once an entity has established that it qualifies for immunity as an agency or instrumentality of a sovereign, the FSIA provides that it shall be immune from suits in both federal and state courts, unless it has waived its immunity or an applicable statutory exception exists.⁷² Absent an enforceable waiver, the FSIA's most noteworthy exception is the commercial activities exception, which is derived from the restrictive theory of immunity.⁷³

2. Overcoming the Presumption of Immunity: The Commercial Activities Exception

Although the FSIA addresses separately jurisdictional immunity

rebutted directly or indirectly to British Columbia's residents. . . .

....

In sum, Powerex is the kind of government entity that Congress had in mind when it wrote the FSIA's "commercial activit[y]" provisions.

Id. at 245-48 (last alteration in original).

⁷¹ H.R. REP. NO. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613-14 (stating Congress intended FSIA's agency and instrumentality provision to include broad group of entities).

⁷² *See Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002) (discussing initial burden of proof in litigation under FSIA). The party claiming FSIA immunity must establish a *prima facie* case that satisfies the FSIA's definition of a foreign state; the burden then shifts to the non-movant party to show that an exception applies. *Id.* While the FSIA specifically authorizes both the explicit and implicit waiver of immunity, the federal courts have narrowly construed the implied waiver provision and have been reluctant to find an implicit waiver of immunity absent evidence of an unmistakable intent to do so. *See Shapiro v. Republic of Bol.*, 930 F.2d 1013, 1017-18 (2d Cir. 1991) (narrowly interpreting implicit waiver exceptions to FSIA). In *Shapiro*, the court declined to find that a sovereign nation's choice to bring a prior suit in the United States courts with respect to a particular matter constituted an implicit waiver of immunity from jurisdiction as to all associated claims. *Id.* at 1017-18. The *Shapiro* court looked to the legislative history of the FSIA to support the conclusion that Congress intended to limit implicit waivers to similarly unambiguous circumstances such as the foreign state filing a responsive pleading and failing to raise the immunity defense. *Id.* at 1017; *see also* H.R. REP. NO. 94-1487, at 18, *reprinted in* 1976 U.S.C.C.A.N. at 6617 (citing three examples of implicit waivers).

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

Id.

⁷³ *See Note, supra* note 25, at 555 (discussing derivation of commercial activities exception).

and immunity from attachment and execution, the FSIA also provides parallel “commercial activities” exceptions to both forms of immunity.⁷⁴ With regard to the statute’s treatment of jurisdictional immunity, the commercial activities exception makes no distinction between the foreign state proper and its agencies and instrumentalities.⁷⁵ Instead, it simply provides that qualified foreign states will not be afforded immunity in claims arising out of commercial acts having a satisfactory nexus to the United States.⁷⁶

However, with regard to attachment and enforcement measures, the FSIA’s commercial activities exception prescribes divergent treatments based on the personality of the sovereign defendant.⁷⁷ In particular, the FSIA distinguishes between the property of agencies or instrumentalities and the property of the foreign state itself.⁷⁸ The property of the foreign state itself may be attached “only when the property was used for the commercial activity on which the claim is based.”⁷⁹ On the other hand, the property of the states’ agencies and instrumentalities is subject to attachment and execution “regardless of whether the property was used for the activity on which the claim is based.”⁸⁰

Likewise, Congress provided separate and additional protections

⁷⁴ See 28 U.S.C. § 1605(a) (2006) (providing exceptions to immunity from jurisdiction for certain cases). An exception exists for cases:

[B]ased upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

§ 1605(a)(2); see also *id.* § 1610(a)-(b) (providing exceptions to immunity from attachment and execution). The property of the foreign state “used for a commercial activity in the United States” and “any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States” can be subject to attachment and execution. § 1610(a), (b).

⁷⁵ See § 1605(a).

⁷⁶ *Id.*

⁷⁷ See generally §§ 1610-1611. The FSIA addresses the property of the foreign state itself in § 1610(a), agencies and instrumentalities in § 1610(b), the property of the central bank, or monetary authority in § 1611(b)(1), and finally the property of military authority in § 1611(b)(2). *Id.*

⁷⁸ See § 1610(a) (addressing immunity as it pertains to property of the foreign state itself); see § 1610(b) (addressing immunity protections afforded to property of agencies and instrumentalities).

⁷⁹ *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d. Cir. 1984) (discussing FSIA’s divergent treatment of property of the foreign state itself); see also § 1610(a).

⁸⁰ See § 1610(b)(2) (establishing immunity protections afforded to central bank property).

for property held by central banks and military authorities.⁸¹ Pursuant to § 1611(b)(1), absent an explicit waiver, property of a foreign central bank or monetary authority that is “held for its own account” is immune from attachment and execution.⁸² Section 1611(b)(1) requires that, in addition to satisfying the commercial activity requirement, a judgment creditor to a central bank must establish that the property in question was not “held for [the central bank’s] own account.”⁸³ Furthermore, the special provisions of § 1611(b)(1) differ from the general rules of § 1610 as they relate to foreign states and other agencies and instrumentalities in that central banks may never waive their immunity from pre-judgment attachment, only attachment in aid of execution.⁸⁴

Despite its importance to the FSIA, determining what constitutes a “commercial activity” has proved troublesome for the courts.⁸⁵ As one commentator has noted, the confusion is largely due to the fact that the statute “does not so much specify what constitutes commercial activity as describes the analysis a court should undertake,” stating that the commercial character of an activity “shall be determined by reference to the nature of the course of conduct . . . rather than by reference to its

⁸¹ See Note, *supra* note 25, at 556 (discussing special treatment of central bank property).

⁸² 28 U.S.C. § 1611(b)(1). The federal courts have consistently held that funds “used to perform functions that are normally understood to be the functions of a nation’s central bank, and are not utilized in commercial activities” are to be considered held for the central bank’s own account. *Bank of Credit & Commerce Int’l (Overseas) Ltd. v. State Bank of Pak.*, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999), *vacated on other grounds*, 273 F.3d 241 (2d Cir. 2001); see *Weston Compagnie de Finance et D’Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993) (applying central bank functions test); see also *NML Capital, Ltd. v. Banco Central de la Republica Arg.*, 652 F.3d 172, 191 (2d Cir. 2011) (noting central bank functions test is only test ever employed by federal courts considering § 1611(b)(1)).

⁸³ See *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) (“If the funds at issue are used for central bank functions as these are normally understood, then they are immune from attachment, even if used for commercial purposes.”); see also *NML Capital Ltd.*, 652 F.3d at 194 (“A plaintiff, however, can rebut [the presumption of immunity afforded to central banks] by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood, irrespective of their ‘commercial’ nature.”).

⁸⁴ See George Weisz, Nancy Schwarzkopf, & Mimi Panitch, *Selected Issues in Sovereign Debt Litigation*, 12 U. PA. J. INT’L BUS. L. 1, 38 (1991) (discussing statutory distinction between waiver of immunity from post-judgment attachment and prejudgment attachment). “[A]lthough commentators have questioned the intent of Congress, most agree that the language in section 1611(b)(1) means that foreign central banks *cannot* effectively waive immunity from prejudgment attachment for property held for their own account.” *Id.*; see also Paul Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT’L L. 327, 376 (2003) (concluding central bank property is immune from prejudgment attachment if “held for its own accounts”).

⁸⁵ See Note, *supra* note 25, at 555 (discussing difficulty experienced by courts in applying commercial activities exception).

purpose.”⁸⁶ In *Republic of Argentina v. Weltover, Inc.*,⁸⁷ the Supreme Court applied a simplified test for determining the commercial nature of a defendant’s conduct.⁸⁸ The Court reasoned that the appropriate inquiry was to determine if a private person could have engaged in similar conduct.⁸⁹ The Court held that despite the fact that Argentina had issued bonds in furtherance of uniquely sovereign and public purposes, the conduct constituted commercial activity because it was of “the *type* . . . by which a private party engages in ‘trade and traffic or commerce.’”⁹⁰

3. Presumption of Separateness

A separate issue that has emerged in the litigation of claims under the FSIA relates to the question of when a foreign state may be held liable for the acts or obligations of its legally separate agencies and instrumentalities, or vice versa.⁹¹ In a typical scenario, a plaintiff will seek to satisfy a judgment against a foreign state by executing upon or attaching the assets of the state’s subsidiary.⁹² However, in enacting the FSIA, Congress clearly stated that “[t]he bill is not intended to affect the

⁸⁶ *Id.* (quoting § 1603(d)).

⁸⁷ 504 U.S. 607 (1992).

⁸⁸ *See id.* at 617 (holding Argentina’s issuance of sovereign bonds constituted “commercial activity” within meaning of FSIA).

⁸⁹ *See id.* at 614.

⁹⁰ *Id.* (quoting BLACK’S LAW DICTIONARY 270 (6th ed. 1990)).

⁹¹ *See* Riblett, *supra* note 7, at 13 (noting importance and prevalence of questions relating to liability in litigation under FSIA). As previously noted, the FSIA permits attachment and execution against the property of the agencies and instrumentalities of the foreign sovereign on much more generous terms than it does the property of foreign state proper. *See supra* notes 77-79 and accompanying text (discussing distinction between immunity afforded to property of state itself and its agencies and instrumentalities). In particular, it is unlikely that the state itself will maintain property in the United States that will satisfy the requirement found in § 1610(b) that the property be “used” for the activity giving rise to the claim. *See* Am. Bar Ass’n Working Grp., *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 585 (2002) (“Only in rare instances would a foreign state have property in the United States . . . ‘used’ for the activity giving rise to the claim.”). It is more likely that the state’s subsidiary will maintain such commercial assets in the United States that are capable of satisfying this condition. *See* Riblett, *supra* note 7, at 30-31 (discussing assets owned by state subsidiaries that may satisfy conditions for attachment or execution). Thus, plaintiffs often seek to join the agencies and instrumentalities of the state and attach their assets in hopes of attributing liability and extending the reach of any potential judgment. *See* Lee, *supra* note 84, at 360 (explaining broader scope for execution against agencies and instrumentality entices plaintiffs to join agencies or instrumentalities).

⁹² *See* First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 624 (1983) (determining whether Cuba’s liabilities could be attributed to legally separate entity); *see also* De Letelier v. Republic of Chile, 748 F.2d 790, 798 (2d. Cir. 1984) (discussing whether Chilean nation airline property could be attached to satisfy judgment against Chilean government).

substantive law of liability.”⁹³ The general rule of liability, in which one party can be held accountable for the acts of another, is based on a presumption of separateness whereby a debtor will not be deemed to own an asset simply because it owns or controls the entity that does so.⁹⁴ To transfer the liability of one debtor to another legally distinct entity, the judgment creditor must establish a basis for disregarding that separate legal status.⁹⁵

The basis for disregarding a sovereign entity’s presumption of legal separateness and thus transferring liability onto the parent government or other such parent entity is based on the “alter ego” doctrine of common-law corporate veil piercing.⁹⁶ Courts may pierce the corporate veil under their general authority to apply equitable principles.⁹⁷ The “alter ego” theory applies when there is such unity between two legally distinct entities that the separateness of the corporation ceases to exist and in its place a principal and agent relationship has taken form.⁹⁸ Accordingly, courts will disregard the limited liability status and hold the “principal” responsible for acts done in the name of the corporation.⁹⁹

⁹³ H.R. REP. NO. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610.

⁹⁴ See *Anderson v. Abbott*, 321 U.S. 349, 361-62 (1944) (noting corporate form generally acts as insulator on all claims of creditors). In *Anderson*, the Court stated, “Limited liability is the rule not the exception . . .” *Id.* at 362; see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (“A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary The fact that the shareholder is a foreign state does not change the analysis.”); see also George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT’L & COMP. L. 665, 682 (2008) (discussing veil-piercing in sovereign context).

⁹⁵ See *First Nat’l City Bank*, 462 U.S. at 627-28 (invoking exception to limited liability).

⁹⁶ See *id.* (discussing history of alter-ego doctrine and corporate veil piercing); see also 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (perm. ed., rev. vol. 1999) (explaining process for invoking alter ego doctrine).

⁹⁷ See *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1376 (Fed. Cir. 1999) (“The concept of ‘piercing the corporate veil’ is equitable in nature and courts will pierce the corporate veil ‘to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.’” (quoting FLETCHER ET AL., *supra* note 96, § 41.20)); see also *Kissun v. Humana, Inc.*, 479 S.E.2d 751, 752 (Ga. 1997) (“Under the alter ego doctrine, equitable principles are used to disregard the separate and distinct legal existence possessed by a corporation.”).

⁹⁸ See *First Nat’l City Bank*, 462 U.S. at 629 (“[The alter-ego doctrine applies] where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created”); see also FLETCHER ET AL., *supra* note 96, § 41.10 (discussing alter ego doctrine generally).

⁹⁹ See FLETCHER ET AL., *supra* note 96, § 41.10 (discussing equitable remedies available to courts). The alter ego doctrine in itself creates no cause of action nor is it a claim for substantive relief. See *Hennessey’s Tavern, Inc., v. American Air Filter Co.* 204 Cal. App. 3d 1351, 1359 (Cal. Ct. App. 1988).

The Supreme Court first addressed the alter ego doctrine in the context of sovereign litigation in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*¹⁰⁰ (“*Bancec*”). The case involved First National City Bank’s (now Citibank) setoff rights against the Cuban Central Bank.¹⁰¹ Following the Cuban government’s expropriation of Citibank assets in Cuba, Citibank effected its setoff claim against a letter of credit claim it had with the Cuban central bank.¹⁰² The Cuban central bank argued that its immunity and separate legal status under the FSIA should protect it from a counterclaim arising out of the actions of its parent foreign government.¹⁰³ The Court confirmed that the FSIA did not affect the substantive law of liability of a foreign state or agency or instrumentality.¹⁰⁴ Moreover, the Court stated that government instrumentalities created as separate juridical entities should enjoy a presumption of legal separateness.¹⁰⁵ However, the Court noted that under the substantive law of liability, this presumption could be overcome in certain circumstances.¹⁰⁶ Specifically, the Court identified two such circumstances: “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created” and where the equitable principles dictate that recognition of the presumption of separateness would work to avoid fraud or injustice.¹⁰⁷ The Court

A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation, where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.

Id.

¹⁰⁰ 462 U.S. 611, 618-19 (1983).

¹⁰¹ *Id.* at 613 (discussing facts of case).

¹⁰² *Id.* at 613-17 (discussing organizational history of Cuban banking and changes resulting from Cuban Revolution). The Cuban central bank acquired the letter of credit claim after the dissolution of the Banco Para el Comercio Exterior de Cuba (“*Bancec*”). *Id.* at 616.

¹⁰³ *Id.* at 617, 619-20 (reviewing lower court holding and current posture of parties). The district court rejected *Bancec*’s argument that its separate juridical status shielded it from liability for the acts of the Cuban Government. *Id.* at 616-17.

¹⁰⁴ *Id.* at 620 (“The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.”).

¹⁰⁵ See *First Nat’l City Bank*, 462 U.S. at 624-26 (discussing nature and beneficial functions attributed to government instrumentalities).

¹⁰⁶ *Id.* at 628-29 (“[C]ourts in the United States and abroad, have recognized that an incorporated entity . . . is not to be regarded as legally separate from its owners in all circumstances.” (footnotes omitted)).

¹⁰⁷ *Id.* at 628-29.

concluded that observing Bancec's separate legal status would cause an injustice.¹⁰⁸

The *Bancec* Court makes it clear that something more than that which is required for qualification as an agency or instrumentality is needed to establish an alter ego argument for veil piercing under the FSIA.¹⁰⁹ However, there is no clear test for when the alter ego doctrine is applicable.¹¹⁰ Instead, the courts have relied heavily on fact-based analyses that are often so unique to the case at hand that they are poorly suited for application in future disputes.¹¹¹

Nonetheless, the courts have had the opportunity to apply the alter ego doctrine in a number of different scenarios.¹¹² For example, in *LNC Investments, Inc. v. Republic of Nicaragua*,¹¹³ the United States Court of Appeals for the Second Circuit rejected the plaintiff's attempt to execute against the funds of the Central Bank of Nicaragua in satisfaction of a judgment obtained against the Government of Nicaragua on a defaulted loan.¹¹⁴ Applying the *Bancec* principles, the Court reviewed the functions and structure of the Nicaraguan Central Bank, as well as the government's control over the day-to-day operations of the central bank, and held that the government did not display the type of excessive control over the central bank to support an alter ego argument.¹¹⁵

¹⁰⁸ See *id.* at 630-32 (reasoning Cuban government would be beneficiary of courts' recognition of Bancec's separate juridical identity). Bancec, as "the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of . . . corporations which it owns and controls." *Id.* (quoting *Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974)).

¹⁰⁹ See *Hester Int'l Corp. v. Fed. Republic of Nigeria*, 879 F.2d 170, 176 n.5 (5th Cir. 1989) (distinguishing between agency in determining organ status and principal/agent relationship of *Bancec* alter ego standard).

¹¹⁰ See Note, *supra* note 25, at 553 (noting absence of bright-line standard in alter ego jurisprudence).

¹¹¹ See *First Nat'l City Bank*, 462 U.S. at 632 ("[O]ur decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."); see also *Hester*, 879 F.2d at 179 ("[D]etermination of whether a government instrumentality is a separate juridical entity involves the application of the law to fact-specific situations.").

¹¹² See, e.g., *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (holding national airline was not alter ego of Chilean government); *EM Ltd. v. Republic of Arg.*, 720 F. Supp. 2d 273, 301-302 (S.D.N.Y. 2010) (holding central bank was alter ego of Argentine government), *vacated on other grounds sub nom.*, *NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172 (2d Cir. 2011); *LNC Invs. Inc. v. Republic of Nicar.*, 115 F. Supp. 2d 358, 363 (S.D.N.Y. 2000) (holding central bank was not alter ego of Nicaraguan government).

¹¹³ 115 F. Supp. 2d 358 (S.D.N.Y. 2000).

¹¹⁴ *Id.* at 366 (holding Central Bank was not alter-ego of Nicaraguan government).

¹¹⁵ See *id.* at 365-66 (reviewing functions of Nicaraguan Central Bank and its relationship to Nicaraguan government).

More recently, in *EM Limited v. Republic of Argentina*,¹¹⁶ the United States District Court for the Southern District of New York ruled that the assets of the Central Bank of Argentina lacked sufficient independence to preserve the presumption of juridical separateness under *Bancec*.¹¹⁷ The court found that after defaulting on its loans, Argentina's government had concentrated power in the hands of the executive branch and systematically took control of the Central Bank.¹¹⁸ The court concluded that by manipulating the bank's leadership, using the bank's funds to repay the Republic's debts, and violating various provisions of the Argentine constitution and the bank's charter, the government had exhibited such disregard for the Central Bank's legal separation that it should be deemed an alter ego of the government.¹¹⁹

However, on appeal, the Second Circuit vacated the district court's attachment order.¹²⁰ While the Second Circuit accepted the lower court's analysis of the alter ego relationship under *Bancec*, the court held that the special protections of § 1611(b)(1) immunized central bank property without regard to the central bank's independence from its parent state.¹²¹ The court concluded that the funds in question were "held for the central bank's own account" and, therefore, absent an explicit waiver, immunized from attachment.¹²²

¹¹⁶ 720 F. Supp. 2d 273 (S.D.N.Y. 2010).

¹¹⁷ See *id.* at 303-04 (holding Central Bank was alter ego of Argentine government).

¹¹⁸ See *id.* at 278-93 (illustrating Republic's influence and control over Central Bank).

¹¹⁹ See *id.* at 299-300.

The Republic ignored the mandate of BCRA's charter, which provided that BCRA would not be subject to any order or instruction of the National Executive in connection with the implementation of monetary and financial policy. The management of BCRA posed no obstacles to the Republic's use of the resources of BCRA exactly as the Republic wished. The Republic's control in this regard was complete. The court concludes that the presumption of separateness is overcome, and that BCRA was the servant or the agent of the Republic as to its funds, within the meaning of the *Bancec* case.

Id. at 300.

¹²⁰ See *NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172, 197 (2d Cir. 2011) (vacating district court's attachment order).

¹²¹ See *id.* at 190 (holding central bank immunity under § 1611(b)(1) unaffected by alter ego analysis).

¹²² See *id.* at 195 (concluding central bank assets immune from attachment). The court held that where central bank assets are used to perform traditionally-recognized central banking functions, such assets are deemed to satisfy the "held for its own account" provision of § 1611(b)(1), and, therefore, immune from attachment. *Id.* at 193-94. The court concluded that since the funds in question were being used to facilitate the regulation of the state currency, a paradigmatic central bank function, those assets were immune from attachment. *Id.* at 195.

III. ANALYSIS

A. FSIA Structural Confusions and Doctrinal Tensions

While motivated by the legitimate concern of avoiding the diplomatic controversies that can arise when a foreign sovereign is subject to U.S. judicial proceedings, the FSIA's current structure is problematic for a number of reasons.¹²³ First, the commercial activities exception works contrary to the public purpose test under the organ status analysis.¹²⁴ The public purpose test asks the court to look at the purpose of the defendant's conduct to determine whether it is an organ of a foreign state, only to have the court later disregard that purpose and focus on the nature of the conduct under the commercial activities exception.¹²⁵

Likewise, the special treatment of central bank property under § 1611(b) is at odds with the commercial activities exception.¹²⁶ This is especially clear in light of the *Weltover* court's interpretation of commercial activity.¹²⁷ Any central bank activity in the open market, such as the management of investments or deposits, could lead the court to deem a bank a "private player" rather than a market regulator under *Weltover*.¹²⁸ Lower courts have widely followed this interpretation, exposing central bank assets to attachment and execution, and thus annulling the effect of any separate protections afforded under § 1611.¹²⁹

¹²³ See Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 48 (1978) (addressing structural problems resulting from failure to define commercial activity).

¹²⁴ See *infra* note 125 and accompanying text (explaining difference between analyses undertaken by courts addressing organ status versus commercial activities exception).

¹²⁵ See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001) (focusing on commercial activities), *aff'd on other grounds*, *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); see also *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 247 (2007) (Breyer, J. and Stevens, J., dissenting) (concluding corporate profits destined for public use essential element in determining qualification under organ status). The organ status analysis focuses on the intended purpose to be served by a defendant entity's actions, however, after qualifying for immunity based on this purpose, the courts will disregard that purpose and strip the entity of its immunity based solely on the nature of the acts. See *Dole*, 251 F.3d at 807 (analyzing organ status test); see also *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (concluding commercial activities test focuses on nature of act, to the exclusion of its purpose).

¹²⁶ See *Lee*, *supra* note 84, at 373-74 (suggesting *Weltover* interpretation of commercial activity exposes central bank foreign-exchange transactions to attachment and execution); see also Note, *supra* note 25, at 556 (suggesting that *Weltover* interpretation of commercial activity renders special protections under § 1611 "mere surplusage").

¹²⁷ See *Weltover*, 504 U.S. at 614 (describing test for determining commercial activities).

¹²⁸ See sources cited *supra* note 126 and accompanying text (discussing impact of *Weltover* definition of commercial activity on central bank immunity).

¹²⁹ See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v.*

Further complicating litigation under the FSIA, the Supreme Court's decision in *Dole* seemingly ignored the statutory provisions for organ status immunity.¹³⁰ As discussed above, the Supreme Court stated in *Dole* that "[t]he statutory language will not support a control test that mandates inquiry in every case into past details of a foreign nation's relation to a corporate entity in which it does not own a majority of shares."¹³¹ This holding supports the conclusion that direct majority ownership is the exclusive means to agency or instrumentality status, effectively rendering the statutes organ prong superfluous.¹³² Following *Dole*, application of the organ status prong has resulted in conflicting opinions, adding to the confusion plaintiffs and practitioners face when litigating claims under the FSIA.¹³³

Perhaps more fundamentally problematic is the contradiction found between the simultaneous presumption of immunity and presumption of separateness afforded to agencies and instrumentalities.¹³⁴ On the one hand, the FSIA attributes the sovereign character of the parent government to agencies and instrumentalities for the purpose of immunity; these characteristics are the basis for establishing the presumption of

Cubic Def. Sys., Inc., 385 F.3d 1206, 1223 (9th Cir. 2004) (holding arbitral award obtained by central bank was not exempt from attachment by judgment creditor), *vacated and remanded sub nom.*, Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 546 U.S. 450 (2006). The Court stated, "The district courts that have considered the central bank exemption so far have read it narrowly; in some cases, the exemption has been found not to apply even where the funds unquestionably belonged to the foreign state's central bank." *Id.* at 1223 n.21. Since the arbitral award was not used or held in connection with central banking activities, it was not exempt from attachment or execution. *Id.* at 1223-24.

¹³⁰ See *supra* notes 58-59, 61 and accompanying text (discussing impact of *Dole* on organ status).

¹³¹ *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

¹³² See *supra* notes 58, 61 and accompanying text (interpreting *Dole* to limit immunity status to ownership analysis).

¹³³ See *supra* note 68 and accompanying text (citing conflicting interpretations of impact of *Dole* on agency instrumentality status analysis).

¹³⁴ See Hoffman, *supra* note 24, at 577-78 (discussing inconsistency between FSIA standards for immunity and liability).

For immunity purposes, section 1603(b) provides that a state-owned entity is an "instrumentality" of the foreign state, and treats the entity largely as if it were the state itself. But for liability purposes, the same entity invariably claims that it is "separate" from the state to such a degree that it should not be identified with the state. Ultimately, section 1603(b) can allow state-owned entities to enjoy the benefits of foreign state status as well as the benefits of "separate entity" status without imposing the risks implicit in instrumentality status.

Id. at 578 (footnotes omitted).

immunity.¹³⁵ On the other hand, the same foreign corporations retain their separate legal status for purposes of liability, thus avoiding liability for the acts of the parent government despite their sovereign characteristics.¹³⁶

The doctrine of sovereign immunity was originally created to apply to the foreign state itself and not her commercial subsidiaries.¹³⁷ Conversely, the limited liability doctrine of corporate separateness was established to benefit private companies and individuals seeking to compete in the marketplace without being held liable for the obligations of their separate corporations.¹³⁸ This doctrine is supported by the economic gains associated with its promotion of investment, entrepreneurship, and generally greater market growth.¹³⁹ However, the FSIA's broad definition of foreign state has encouraged foreign sovereigns to structure their commercial operations through legally separate entities that enjoy a level of immunity similar to that of the foreign state proper.¹⁴⁰ The Supreme Court in *Bancec* made a strong case for the utility and societal benefits that foreign sovereigns can derive from the corporate structure, stating:

Increasingly during this century, governments throughout the world have established separately constituted legal entities [permitting them] to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control [and] obtain the financial resources

¹³⁵ See Lee, *supra* note 84, at 360 (discussing how FSIA permits agencies and instrumentalities to enjoy "dual identities"). Due to the Act's divergent treatment of immunity and liability, agencies and instrumentalities can assume one identity for the purpose of immunity from jurisdiction and another for immunity from liability. *Id.*

¹³⁶ See *id.* (discussing effects of dual identities under FSIA).

¹³⁷ See *supra* Part II.A (discussing origins of doctrine of sovereign immunity in U.S. courts); see also Riblett, *supra* note 7, at 18 (discussing historical application of sovereign immunity).

¹³⁸ See Riblett, *supra* note 7, at 18 ("[H]istorically [the doctrine of corporate separateness] . . . applied to traditional companies and individuals who seek to compete in the marketplace.").

¹³⁹ See, e.g., Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 495 (2001) ("[T]here is a widely shared view that limited liability was, and remains, essential to attracting enormous amount of investment capital necessary for industrial corporations to arise and flourish."); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 90-98 (1985) (discussing economic and legal benefits attributed to doctrine of limited liability); Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 2008 BYU L. REV. 1165, 1166 (2008) (noting significant economic benefits associated with doctrine of limited liability).

¹⁴⁰ See Riblett, *supra* note 7, at 18 (discussing increasing use of corporate structure by foreign government to avoid liability for commercial activities).

needed to make large-scale national investments.¹⁴¹

Nonetheless, the benefits attributed to a sovereign's utilization of separate corporate entities are founded on the doctrine of limited liability and not on the notion that such entities, as market participants, must be afforded immunities on par with the state itself.¹⁴² That an entity can qualify for both immunity, which is a fundamentally *sovereign* trait, and corporate separateness, which is a fundamentally *private* trait, creates discord in the law.¹⁴³ This discord is due to the fact that the analysis for agency or instrumentality status and the alter ego status required for veil piercing are based on two different standards.¹⁴⁴

As discussed in greater detail above, the degree of sovereign association required for qualification for immunity protections under the organ prong of the FSIA's agency and instrumentality status is relatively simple to achieve.¹⁴⁵ Essentially, an entity need only demonstrate that it serves some public purpose and that the state exerts some reasonable amount of control over its operation.¹⁴⁶ However, to satisfy the *Bancec* standard for alter ego veil piercing, the control exercised by the state must be so significant so as to rise to the level of day-to-day operational

¹⁴¹ *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983).

¹⁴² *See id.* In its discussion of the utility of corporate structure to government function and the economic and legal benefits of corporate separateness, the Court never suggests a need for immunization of such corporate bodies. *Id.* On the contrary, the Court focuses on the need to distinguish the subsidiary corporation from its parent government. *Id.* at 625-26; *see also* Riblett, *supra* note 7, at 18-19 (demonstrating that commentators do not view immunity as requisite for economic benefits from limited liability).

¹⁴³ *See* Hoffman, *supra* note 24, at 577-78 (discussing inconsistency between FSIA standards for immunity and liability); *see also* Riblett, *supra* note 7, at 19 (discussing tension between *Bancec* alter-ego standard and qualification for immunity under organ standard).

¹⁴⁴ *See* Hester Int'l Corp. v. Fed. Republic of Nigeria, 879 F.2d 170, 176 n.5 (5th Cir. 1989). The use of the single term "agency" for two purposes . . . may cause some confusion. The FSIA uses it to determine whether an "agency" of the state may potentially qualify for foreign sovereign immunity itself under the FSIA. This is a completely different question from [the *Bancec* alter-ego analysis] Although such an alter ego relationship may be described in terms of "agency," it is a completely different inquiry than that which might be conducted under § 1603 [T]he level of state control required to establish an "alter ego" relationship is more extensive than that required to establish FSIA "agency." *Id.*

¹⁴⁵ *See supra* Part II.B.1 (discussing qualification for presumption of immunity under FSIA); *see also* Patrickson v. Dole Food Co., 251 F.3d 795, 807 (9th Cir. 2001) (holding performance of public activity on behalf of foreign government sufficient to establish organ status).

¹⁴⁶ *See* Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004) (performing traditionally governmental functions and having operations overseen by government sufficient to prove organ status); *see also* Riblett, *supra* note 7, at 19 (noting low evidentiary requirements for establishing organ status).

control.¹⁴⁷ Therefore, it is possible for commercial entities and their sovereign parents to enjoy the dual protections of corporate separateness and sovereign immunity.¹⁴⁸

Despite the fact that the activities in which these entities engage are essentially commercial in nature, the FSIA permits them to masquerade in the marketplace and compete with their non-state counterparts while retaining the benefit of presumed immunity.¹⁴⁹ The benefits of such a presumption of immunity are extensive and create an unjust imbalance between the plaintiff and the sovereign defendant, arguably constituting the most significant problem with the current structure of the FSIA.¹⁵⁰

B. The Presumption of Immunity Leads to a Disadvantaged Plaintiff

The FSIA is structured to provide a broad presumption of sovereign immunity to a variety of potential defendants.¹⁵¹ Once an entity qualifies for the presumption of immunity, the burden of proof then shifts to the plaintiff to invoke a statutory exception to rebut immunity.¹⁵² While the commercial activities exception allows litigants to seek legal redress in disputes arising out of their commercial transactions, the sovereign defendant's mantle of immunity does not drop off before conferring many inequitable protections and procedural advantages upon the sovereign defendant.¹⁵³

Plaintiffs are disadvantaged because they are often unaware that the corporation with whom they are contracting may be entitled to immunity.¹⁵⁴ Foreign shareholder identities are often unavailable to business partners, and corporate names provide little indication as to the

¹⁴⁷ See *Gabay v. Mostazafan Found. of Iran*, 968 F. Supp. 895, 899 (S.D.N.Y. 1997) (affirming alter-ego relationship depends on level of "control over the day-to-day activities" of entity); see also *Hester*, 879 F.2d at 176 n.5 ("[T]he level of state control required to establish an 'alter ego' relationship is more extensive than that required to establish FSIA [organ status]").

¹⁴⁸ See Riblett, *supra* note 7, at 19-23 (discussing potential for dual protections of sovereign immunity and limited liability); see also Hoffman, *supra* note 24, at 577 (discussing how state-owned entities can benefit from inconsistency between standards for immunity and liability).

¹⁴⁹ See Hoffman, *supra* note 24, at 569-71 (discussing unfair surprise plaintiffs face when commercial counterpart's sovereign identity is revealed and immunity attaches).

¹⁵⁰ See *infra* Part III.B; see also Hoffman, *supra* note 24, at 571-74 (discussing procedural benefits that follow presumption of immunity).

¹⁵¹ See *supra* Part II.B.1 (discussing FSIA structure and presumption of immunity).

¹⁵² See *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002) (discussing procedural implications for litigating claims under FSIA).

¹⁵³ See Hoffman, *supra* note 24, at 571-74 (analyzing procedural consequences for plaintiffs litigating under FSIA).

¹⁵⁴ *Id.* at 569-71 (discussing sovereign's "hidden identity").

presence of either sovereign shareholders or potential organ status.¹⁵⁵ Moreover, as Justice Breyer indicated in *Powerex*, qualification for organ status may be dependent on factors that are not apparent to plaintiffs at the outset of the agreement, such as the level of government influence in corporate affairs or the destination or use of profits derived from corporate transactions.¹⁵⁶

Parties unaware that their business counterpart may be immune from suit or possess sheltered assets are unable to take precautionary steps to protect themselves.¹⁵⁷ With prior knowledge that their business counterpart may qualify for immunity, a party could proactively protect themselves by securing waivers of immunity in their contracts or generally ensuring that the transaction satisfies one of the FSIA exceptions.¹⁵⁸ Often, plaintiffs only come to learn of their counterpart's sovereign identity after litigation has already commenced, constituting unfair surprise.¹⁵⁹

Similarly, the presumption of immunity that attaches to foreign state status, and the application of the FSIA that then follows, creates a number of procedural disadvantages for plaintiffs litigating under the FSIA.¹⁶⁰ The FSIA provides special rules for service of process and, more importantly, requires specific rules for service of agencies and instrumentalities.¹⁶¹ A plaintiff without advanced knowledge as to which rules apply to their counterpart runs the risk of dismissal for noncompliance.¹⁶² Likewise, because the FSIA expressly forecloses the right to jury trial, the potentially vitiating effect on the plaintiff's traditional

¹⁵⁵ *Id.* at 570 n.171 (citing examples of foreign corporations concealing entitlement to special treatment under FSIA).

¹⁵⁶ See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 245 (2007) (Breyer, J., dissenting) (concluding corporate profits destined for public use was essential element in determining organ status).

¹⁵⁷ See Hoffman, *supra* note 24, at 569-71 (discussing inequitable effects resulting from sovereign's hidden identity).

¹⁵⁸ See *id.* at 570-71 (discussing protective measures available to parties with prior knowledge of potential for immunity claims).

¹⁵⁹ See *Geveke & Co. Int'l, Inc. v. Kompania Di Awa I Elektrisidat Di Korsou, N.V.*, 482 F. Supp. 660, 661 n.4 (S.D.N.Y. 1979) (demonstrating counsel for foreign corporation was surprised to realize its client qualified for immunity).

¹⁶⁰ See Hoffman, *supra* note 24, at 571 (discussing procedural consequences of "foreign state" status).

¹⁶¹ Compare 28 U.S.C. § 1608(b) (2006) (stating agencies or instrumentalities may be served directly by mail), with § 1608(a) (stating service by mail made against foreign states must be made through diplomatic channels).

¹⁶² See Hoffman, *supra* note 24, at 571 (explaining significance of noncompliance); see also *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1411-14 (E.D. Va. 1988) (demonstrating plaintiff's non-compliance with § 1608 fatal to claim).

rights and remedies under state and federal laws is immediately apparent.¹⁶³

Further frustrating a plaintiff's litigation, the FSIA entitles foreign states and their agencies and instrumentalities to special removal rights.¹⁶⁴ Unlike the thirty-day limit found in the Federal Rules of Civil Procedure, the FSIA's foreign state status empowers sovereign defendants to enlarge this removal period "for cause shown," arguably authorizing foreign states to indefinitely delay their removal petition.¹⁶⁵ Most importantly, however, the FSIA's removal provisions empower foreign states and their agencies and instrumentalities with the absolute right to remove any civil action to the federal courts regardless of the jurisdictional basis for suit against the other parties involved.¹⁶⁶ Thus, the presumption of immunity, from which these removal powers flow, impedes on the plaintiff's choice of forum, increases the cost of litigation, and produces an inequitable balance of power.¹⁶⁷

Moreover, the FSIA's restrictions on prejudgment attachment and execution provide sovereign defendants with significant tools for avoiding and otherwise frustrating a plaintiff's ability to enforce successful judgments.¹⁶⁸ While the general exception to immunity from execution under § 1610(a) permits attachment in aid of execution by way of either a waiver or application of the commercial activities exception, § 1610(d)

¹⁶³ See § 1330(a) (restricting jurisdiction to "nonjury civil action"); FED. R. CIV. P. 38 (explaining right to jury trial and procedures for jury trial demand); see also *Bailey v. Grand Trunk Lines New Eng.*, 805 F.2d 1097, 1100-01 (2d. Cir. 1986) (confirming FSIA precludes trial by jury against instrumentality of foreign state).

¹⁶⁴ See § 1441(d) (discussing special removal rights available in actions involving foreign states). Compare § 1441(b) (diversity jurisdiction), with § 1441(c) (federal question jurisdiction).

¹⁶⁵ Compare § 1446(b) ("The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."), with § 1441(d) ("[T]he time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown."). See also *Hoffman*, *supra* note 24, at 571-72 (discussing potential for FSIA's enlarged removal period to delay litigation). But see *Dehart v. A.C. & S., Inc.*, 682 F. Supp. 792, 794-95 (D. Del. 1988) (holding removal petition on foreign instrumentality grounds filed over four years after service was untimely).

¹⁶⁶ See § 1441(d) ("Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title 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 also *Jonathan Remy Nash, Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. INT'L L.J. 71, 116-23 (1998) (exploring scope of removal jurisdiction under FSIA).

¹⁶⁷ See *Hoffman*, *supra* note 24, at 572 (addressing expenses associated with litigating against qualified entities and interference with plaintiff's choice of forum).

¹⁶⁸ See *Riblett*, *supra* note 7, at 28 (suggesting most important advantage for qualified foreign states is ability to resist attachment or execution).

provides a much more difficult standard for the exception to immunity from prejudgment attachment.¹⁶⁹ Under § 1610(d), a plaintiff may only utilize prejudgment attachment to secure satisfaction of a judgment as opposed to obtain jurisdiction.¹⁷⁰ More importantly, prejudgment attachment requires that the plaintiff not only satisfy the commercial activities exception of § 1610(a), but also obtain a valid waiver.¹⁷¹ Satisfying all three elements and invoking the exception to immunity for prejudgment attachment is an exceedingly difficult task, especially in light of the fact that the sovereign identity of the defendant is often hidden from the plaintiff prior to commencing litigation.¹⁷²

The ability to secure assets by way of attachment and execution is essential to a plaintiff's ability to enforce their claim.¹⁷³ However, the plaintiff's disadvantage and the importance of attachment and execution under the FSIA becomes all the more significant in light of the grace period afforded under § 1610(c).¹⁷⁴ The § 1610(c) grace period provides that, following an entry of judgment, parties are prevented from attaching or executing against assets in satisfaction of their judgment until the court has determined that a reasonable amount of time has elapsed.¹⁷⁵ The impact of

¹⁶⁹ Compare § 1610(a), with § 1610(d).

¹⁷⁰ See § 1610(d)(2).

¹⁷¹ See § 1610(d)(1).

¹⁷² See *supra* note 159 and accompanying text (discussing surprise plaintiffs experience when counterparties qualify for immunity).

¹⁷³ See *supra* notes 45-47 and accompanying text (discussing importance of attachment and execution measures to litigation under FSIA). Without attachment and measures of execution, a plaintiff must rely entirely on the foreign government's voluntary compliance with the judgment. *Id.*; see also *EM Ltd. v. Republic of Arg.*, 720 F. Supp. 2d 273, 278-79 (S.D.N.Y. 2010) (illustrating Argentina's immunity from attachment and execution to avoid satisfying judgments), *vacated on other grounds sub nom.*, *NML Capital, Ltd. v. Banco Central de la Republica de Arg.*, 652 F.3d 172 (2d Cir. 2011). Judge Thomas Griesa seemingly took offense to Argentina's continued efforts to avoid compliance with the courts judgment awards, stating:

It is true that the Republic has duly consented to the jurisdiction of the federal court in New York City, and has been reasonably cooperative in litigation leading to the entry of many judgments against the Republic based on defaulted bonds. However, as it turns out, this has all been largely pro forma. As we know, judgments are worthless without the ability to enforce them. Despite the commitment in the bonds that there could be judgments which "may be enforced," the Republic has done everything in its power to prevent such enforcement.

Id.

¹⁷⁴ See Riblett, *supra* note 7, at 29 (discussing critical importance of grace period under § 1610(c)).

¹⁷⁵ § 1610(c) ("No attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has

such a delay can frustrate attachment entirely, as it will often provide the foreign state, or its agencies and instrumentalities, with sufficient time to transfer or otherwise shield any susceptible assets following the entry of a judgment against them.¹⁷⁶

IV. REFORM PROPOSALS

No other international jurisdiction affords legally separate entities presumptive immunity.¹⁷⁷ Rather, most nations have expressly rejected this notion, instead relying on the separate entity rule to determine the legal status of corporate bodies and limiting the attachment of immunity status for legally separate entities to sovereign acts.¹⁷⁸ Thus, the presumption of immunity under § 1603 runs directly contrary to the modern international practice for conferring sovereign immunity.¹⁷⁹ In this sense, the current structure of the FSIA does not achieve its purpose of promoting comity, a fundamental principle of sovereign immunity.¹⁸⁰ Likewise, under the current framework, the presumptive immunity afforded to legally separate entities under the agency and instrumentalities provision of § 1603(b) is inconsistent with the rationale of restrictive immunity, in that it provides immunity protections to entities engaged in commercial activity.¹⁸¹

elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.”). Although the FSIA does not define the term “reasonable period of time,” lower courts have generously withheld from granting motions for declarations of “reasonable period of time” for anywhere from thirty days to two months. *See* *FG Hemisphere Assocs. v. Republique du Congo*, No. 01 Civ.8700SASHBP, 2005 WL 545218, at *7 (S.D.N.Y. Mar. 8, 2005) (concluding thirty days was reasonable period of time); *Gadsby & Hannah v. Socialist Republic of Rom.*, 698 F. Supp. 483, 486 (S.D.N.Y. 1988) (concluding two months was reasonable period of time).

¹⁷⁶ *See* Riblett, *supra* note 7, at 29 (discussing ability of foreign states to utilize § 1610(c) grace period to move assets after judgment).

¹⁷⁷ *See* Hoffman, *supra* note 24, at 551-65 (comparing divergent international approaches to sovereign immunity); *see also* Sunil R. Harjani, Comment, *Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 NW. J. INT’L L. & BUS. 181, 184 (1999) (noting U.S. is only jurisdiction to recognize state-ownership as conferring immunity to separate entities).

¹⁷⁸ *See* Hoffman, *supra* note 24, at 542-64 (discussing predominance of separate entity rule in international jurisdictions).

¹⁷⁹ *See id.* at 565 n.149 (“[T]he 1603(b)(2) ‘majority ownership interest’ clause has no support in international law and virtually none in pre-FSIA American law.”).

¹⁸⁰ *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting foreign sovereign immunity is matter of grace and comity, not restriction imposed by Constitution); *see also* *Republic of Phil. v. Pimentel*, 553 U.S. 851, 853 (“[I]mportant comity concerns are implicated by assertion of foreign sovereign immunity.”).

¹⁸¹ *See* Harjani, *supra* note 177, at 200 (“[E]ven the initial grant of sovereign immunity to a [state-owned entity], which by nature, as a corporation, is almost always engaged in commercial activities, runs contrary to the very purpose of restrictive sovereign immunity.”).

Congress should amend the definition of “foreign state” under § 1603 to exclude agencies and instrumentalities, and in its place, utilize the separate entity rule for determining sovereign status of legally separate entities.¹⁸² However, in recognition of the valid need to provide presumptive protections for certain organizations and governmental systems, the statutory definition of “foreign state” should specifically include departments and ministries of government, government funded independent regulatory bodies serving principally public functions, foreign central banks, and armed services.¹⁸³

Application of the separate entity rule would deny legally separate entities the protections of the FSIA unless and until the corporate defendant shows that the claim arises out of an activity that was sovereign in nature.¹⁸⁴ The separate entity rule’s exception permits those entities in fact engaged in sovereign activity to retain the ability to assert the sovereign immunity defense, while greatly reducing the inequitable and unexpected effects resulting from the application of § 1603’s presumptive immunity.¹⁸⁵

A second area in need of reform lies in the FSIA’s treatment of immunity from execution.¹⁸⁶ Codified in § 1610 generally, and § 1611’s property-specific exclusions, the FSIA’s provisions relating to immunity from execution are structurally daunting and ineffective.¹⁸⁷ In particular, confusion arises from the fact that the FSIA distinguishes between immunity from jurisdiction and immunity from execution.¹⁸⁸ Although it is generally recognized that a nation’s authority to exercise jurisdiction to adjudicate may be distinct from its authority to exercise jurisdiction to enforce, there exists no need for the court to base its jurisdictional analyses

¹⁸² See *supra* Part III.B (discussing plaintiff’s procedural disadvantages due to presumption of immunity); see also Hoffman, *supra* note 24, at 583-84 (explaining superiority of separate entity rule to § 1603(b) as device for conferring protections of FSIA).

¹⁸³ See Granne, *supra* note 55, at 17 (discussing need for flexible agency and instrumentality definition that encompassed various organizations and government systems); see also Riblett, *supra* note 7, at 38 (proposing to replace agency/instrumentality provision of “foreign state” definition with enumerated government entities serving public purposes); Am. Bar Ass’n Working Grp., *supra* note 91, at 541-43 (proposing reforms to FSIA definition of “foreign state”).

¹⁸⁴ See Hoffman, *supra* note 24, at 581 (discussing advantages of separate entity rule and noting application would shift initial burden to defendant).

¹⁸⁵ See *id.* at 584 (lauding benefits of separate entity rule). The separate entity rule would permit “those entities truly engaged in sovereign activity to successfully assert the defense of sovereign immunity without the unfair and unexpected consequences of § 1603(b)”. *Id.*

¹⁸⁶ See Am. Bar Ass’n Working Grp., *supra* note 91, at 581 (recognizing need to reform FSIA’s provisions relating to immunity from execution).

¹⁸⁷ See *id.* (describing FSIA execution immunity provisions “as among the most confusing and ineffectual in the statute.”).

¹⁸⁸ See *supra* Part II.B.2 (discussing statutory distinction between jurisdictional immunity and immunity from attachment and execution).

on different standards.¹⁸⁹ Nonetheless, the FSIA prescribes divergent approaches for immunity from jurisdiction and execution, and this inconsistency adds substantial complexity and confusion to the courts adjudication of claims and restrains successful plaintiffs in their efforts to enforce their judgments.¹⁹⁰

Congress should amend § 1610 to create greater harmony in the treatment of jurisdictional immunity and immunity from execution.¹⁹¹ To this end, the above proposals relating to the elimination of agencies and instrumentalities from the definition of foreign state under § 1603 would further reduce structural confusion by obviating the need for § 1610(b)'s divergent treatment of measures of execution for agencies and instrumentalities.¹⁹² Similarly, the statute should be amended so as to eliminate the need to obtain both a waiver from jurisdiction and a waiver from execution.¹⁹³ As currently written, a contracting party must obtain separate waivers of immunity from jurisdiction and execution.¹⁹⁴ By eliminating this distinction, Congress could simplify the court's analysis of jurisdictional immunity and immunity from execution while reducing the uncertainty for contracting parties with regards to the effectiveness of their waivers.¹⁹⁵

Finally, Congress should eliminate the nexus requirement found in

¹⁸⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 401 cmt. a (1987).

The limitations on a state's authority to subject foreign interests or activities to its laws differ from those that govern the state's jurisdiction to adjudicate, and the limitations on a state's authority to enforce its law through administrative, executive, or police action differ in some respects from those that apply to enforcement through its courts.

Id.

¹⁹⁰ See *supra* notes 186-87 and accompanying text (citing criticism of FSIA's provisions relating to immunity from execution).

¹⁹¹ See Am. Bar Ass'n Working Grp., *supra* note 91, at 583 (advocating greater harmony between jurisdictional immunity and immunity from attachment and execution).

¹⁹² See *supra* notes 182-83 and accompanying text (arguing that eliminating agency and instrumentality provisions would align analysis for immunity issues).

¹⁹³ See Am. Bar Ass'n Working Grp., *supra* note 91, at 550 (proposing to amend FSIA to permit parties to rely on universal waiver of immunity).

¹⁹⁴ See *id.* at 584 (interpreting FSIA as requiring individual and separate waivers of immunity from jurisdiction, attachment, and execution). See generally 28 U.S.C. § 1610 (2006).

¹⁹⁵ See Am. Bar Ass'n Working Grp., *supra* note 91, at 583-84 (identifying need to reform and harmonize FSIA waiver provisions); see also Hoffman, *supra* note 24, at 570-71 (discussing FSIA's propensity for confusion and inequitable effects arising from hidden identity of sovereign defendant).

§ 1610(a)(2).¹⁹⁶ In its current form, the FSIA limits the property available for execution or attachment in claims against the foreign state itself to property used for a commercial activity in the United States that has additionally been “used for the commercial activity upon which the claim is based.”¹⁹⁷ The situs requirement itself eliminates significant properties that may potentially be used to satisfy a claim.¹⁹⁸ However, the nexus requirement poses the greatest difficulty for a plaintiff because it is rare, especially in breach of contract claims, that a foreign state will have any property “used” for the activity giving rise to the claim, much less in the United States.¹⁹⁹ Considering that such commercial claims have come to dominate litigation under the FSIA, plaintiffs commonly find themselves with a right without a remedy.²⁰⁰ Eliminating the nexus requirement would provide plaintiffs with additional property to satisfy successful judgments against sovereign defendants, further harmonize the FSIA’s treatment of immunity from jurisdiction and execution, and reduce the plaintiff’s futile reliance on a foreign sovereign’s voluntary compliance with adverse judgments.²⁰¹

V. CONCLUSION

Much has changed on both the political and economic fronts since the enactment of the FSIA. In light of globalization and progressive government structure, today’s marketplaces are increasingly populated by state-owned corporations engaged in commercial conduct with private parties in a way Congress could have never anticipated thirty years ago.

¹⁹⁶ See § 1610(a)(2) (limiting execution and attachment to property used in United States giving rise to claim).

¹⁹⁷ *Id.*

¹⁹⁸ See Am. Bar Ass’n Working Grp., *supra* note 91, at 584 (“Several factors combine to make execution against foreign states extremely restrictive. First is the threshold requirement in section 1610(a) that the property against which attachment in aid of execution or execution is sought must be ‘used for a commercial activity in the United States.’ At the outset, this eliminates large classes of property that might be candidates for execution in satisfaction of a judgment against a foreign sovereign.”).

¹⁹⁹ See *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-799 (2d. Cir. 1984) (demonstrating difficulty plaintiffs face in finding attachable assets to satisfy judgments against foreign states); see also Am. Bar Ass’n Working Grp., *supra* note 91, at 584 (illustrating limited examples of when foreign state may possess property satisfying § 1610(a)(2) nexus requirement).

²⁰⁰ See Am. Bar Ass’n Working Grp., *supra* note 91, at 585 (explaining predominance of cases concerning commercial activities exception in litigation under FSIA); see also *De Letelier*, 748 F.2d at 799 (stating FSIA can leave plaintiffs with “a right without a remedy”).

²⁰¹ See *supra* notes 196-99 and accompanying text (demonstrating significance of FSIA’s current restrictions on execution); see also *De Letelier*, 748 F.2d at 799 n.4 (describing plaintiff’s remedy as “tenuous” reliance on “act of international good-will to honor the judgment”).

Given the great power and influence that accompanies state ownership and sponsorship, particularly financial and political support, it seems neither necessary nor appropriate that such sovereign entities be afforded the additional benefit of presumed immunity. Furthermore, the FSIA in its current construction is procedurally awkward and the jurisprudence that has evolved around its application is often conflicting. For these reasons the FSIA should be revised. The implementation of the amendments proposed in this Note would provide greater certainty in the courts, greater harmony with other international jurisdictions, and strike a greater balance of power between plaintiffs and sovereign defendants.

Matthew Engellenner

**This Note is dedicated to my father, my mentor and my hero.*