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Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis

David Aronofsky*

I. Introduction

Multinational enterprises collectively represent the most powerful economic forces in the world. Their continued economic potency depends in part upon adequate legal liability risk assessment for the acts of their corporate constituents, which requires an ability by the enterprise legal planner to predict when courts will apply the doctrine of limited liability. This doctrine has traditionally meant, with certain narrowly defined exceptions, "that shareholders of a corporation are under no obligation to the corporation or its creditors."¹

The limited liability doctrine has unfortunately spawned large numbers of inconsistent, often illogical, and increasingly unpredictable decisions from courts confronted by the issue whether to pierce the corporate veil. One noted legal scholar has described the resulting veil-piercing jurisprudence as a compendium of "hundreds of decisions that are irreconcilable and not entirely comprehensible."² The United States Supreme Court has characterized the legal rules and principles for resolving the issue of when to pierce the corporate veil of one corporation for the acts of its affiliate as "still enveloped

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¹ Meiners, Mofsky & Tollison, *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 353 (1979). The Supreme Court has recently observed that limited liability is "the rule, not the exception, and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital invested." *First National City Bank v. Banco para el Comercio Exterior de Cuba*, 103 S. Ct. 2591, 2599-2600 (1983) (quoting *Anderson v. Abbot*, 321 U.S. 349, 362 (1944)). This view is by no means limited to the United States, as noted by Professor Horn: "The absence of personal liability of a shareholder for the company is a basic principle of corporation law in all Western countries and a basic tenet underlying the construction of combines." Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U. L. REV. 923, 934 (1981). See generally P. MEINHARDT, *COMPANY LAW IN EUROPE* (3d ed. 1981).

² P. BLUMBERG, *THE LAW OF CORPORATE GROUPS* § 1.02, at 8 (1983). An American trial judge recently noted: "The corporate veil has become a misnomer in modern times . . . and because the courts have recognized that a corporate veil may be pierced for one purpose, but not another, today's corporation is multiveiled." *Amarillo Oil Co. v. Mapco, Inc.*, 99 F.R.D. 602, 603 (N.D. Tex. 1983).

in the mists of metaphor,"³ and the leading British writer on this subject has stated that the resulting body of case law "smacks of palm tree justice rather than the application of legal rules."⁴ This tendency poses greater potential harm than either the chilling of investor activity through increased risk of shareholder liability, which the limited liability doctrine seeks to avert; or the commission of fraud, injustice or unfairness, which corporate veil-piercing seeks to avoid, since failure to correct such a trend undermines the credibility of the judicial system to resolve the legal disputes in a fair, consistent, and predictable manner.

To achieve greater consistency and coherence in the resolution of legal disputes arising from the conduct, and occasionally the status of multinational company affiliated corporations, this article proposes that a framework based upon enterprise analysis principles be used by the courts in their treatment of all veil-piercing issues. Such an analysis presumes the disregard of the corporate veil for liability, jurisdiction, and other legal purposes once common ownership, direction, and unity of economic purpose among corporate affiliates within the company can be shown.⁵ To overcome this presumption, a corporation would have to show that its conduct and economic status within an enterprise are completely unrelated to the dispute before the court. It could not rely solely upon legally separate corporate existence or observation of separate corporate formalities to overcome this presumption, except to the extent a specific statute permits such a defense. Meeting such a burden would be extremely difficult for parent corporations and their wholly owned subsidiaries absent express statutory authority to the contrary. This rule is consistent with the recent Supreme Court determination that a parent and its wholly owned subsidiary possess identical legal and economic interests as a matter of law.⁶

Use of enterprise analysis principles in veil-piercing cases could significantly improve the quality of judicial decision-making. These principles are clearly in harmony with both recently developing, and, in some instances, fairly well established legal trends. Further, they may constitute a return to, rather than a radical departure from, basic corporation law tenets of limited liability, which were originally created to protect natural persons rather than incorporated share-

³ *Banco para el Comercio*, 103 S. Ct. at 2598 (quoting *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E.2d 58, 68 (1926)).

⁴ L. C. B. GOWER, *MODERN COMPANY LAW* 138 (4th ed. 1979).

⁵ For purposes of this work, "parent" shall mean a corporation that possesses a majority interest or voting control over the shares of a separately incorporated subsidiary or affiliate. "Subsidiary" and "affiliate" are also interchangeable, except where specified to the contrary in the text. The author would call attention to the Fifth Circuit admonitions in *Baker v. Raymond Intern., Inc.*, 656 F.2d 173 (5th Cir. 1981), that terminology in veil-piercing cases should not be taken too literally. *Id.* at 179 n.5.

⁶ *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2742 (1984).

holders.⁷ Enterprise analysis also reflects the economic reality of numerous multinational companies, which seldom, if ever, have qualms about disregarding the separate legal identities of their own corporate constituencies when to do so would permit maximization of profits for the company as a whole. The proposed alternative does not offend constitutional personal jurisdictional principles, particularly regarding multinational company corporate affiliates; nor does it seek to modify the recently emerging *forum non conveniens* doctrine, which encourages various legal disputes involving a multinational company to be heard in a foreign forum whenever the facts support such a result. Rather, the alternative seeks to replace an ineffectual body of veil-piercing law that "fails to provide a workable framework for analysis" with a more suitable set of rules.⁸

II. General Theories of Piercing the Corporate Veil and Inherent Legal Conflicts Involving the Multinational Company

A. *The Inadequacy of International Law for Resolving Veil-Piercing Disputes Involving the Multinational Company*

One of the great problems confronting multinational corporations today is the lack of uniformity in corporate and commercial laws around the world.⁹ The legal relationships among corporate affiliates of such an enterprise traditionally reflect the notion that each is a "native within the country of its incorporation," a concept somewhat removed from the extraterritoriality of home country law and foreign parental control over the activities of the host country "citizens."¹⁰ In disputes involving multinational enterprises, interna-

⁷ It should also be remembered that the initial and still principal purpose of the limited liability doctrine has been to satisfy "[a] practical need . . . for natural persons to be able to pool their capital into operative business entities while protecting the *personal* assets of each investor from the unrelated claims of co-investors and of persons dealing with the business entity." Bryant, *Piercing the Corporate Veil*, 87 *COMM. L.J.* 299, 299 (1982) (emphasis added). See generally BLUMBERG, *supra* note 2, § 1.01.1, at 3-4.

⁸ See BLUMBERG, *supra* note 2, at xxvii.

⁹ Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 *HARV. L. REV.* 739, 741-42 (1970). There are fairly substantial variations in corporate law and its judicial application among the common law countries; between common law and civil law countries; and particularly among civil law countries, prompting Professor Schlesinger to conclude that "insofar as corporation laws are concerned, it is difficult to divide the civil-law world into . . . convenient groupings." R. SCHLESINGER, *COMPARATIVE LAW* 748 (4th ed. 1980).

Professor Hadari wrote some years ago that the law related to multinational enterprises "remains undeveloped despite [its] dramatic rise . . . since World War II [W]hile the character of business has become multinational, the essence of corporate law remains national. This incongruity causes problems." Hadari, *The Structure of the Private Multinational Enterprise*, 71 *MICH. L. REV.* 729, 754 (1973).

Professor Charney writes that the transnational corporations themselves "recognize the benefits of a uniform regulatory scheme that would avoid many of the difficulties produced by varying national requirements." Charney, *Transnational Corporations and Developing Public International Law*, 1983 *DUKE L.J.* 748, 749.

¹⁰ Vagts, *supra* note 9, at 743.

tional law has served the limited role of defining corporate nationality. *Barcelona Traction*,¹¹ the leading contemporary international law case on corporations, held in a sharply divided International Court of Justice opinion that corporate nationality is determined by the place of incorporation.¹² Although an international definition of corporate nationality is not without its use in resolving certain legal disputes, reaching a consensus about the nature of such a definition will be difficult, if not impossible, because international legal authority recognizes at least five separate and distinct tests.¹³

International law provides little aid to courts adjudicating legal actions brought against affiliate members of the multinational enterprise. This is not surprising, because traditionally "[w]hen a state has a recognized basis for prescribing rules to govern a person or activity, international law is usually neutral."¹⁴ The emerging codes of conduct that seek to guide governments and enterprises in their relationships with one another, may ultimately flesh out the current skeleton of international corporate law and the even barer skeleton of international law applied to transnational corporate veil-piercing.¹⁵ These codes generally do not bind a court seeking to resolve a legal dispute, and some code provisions may well contravene the law or public policy of the sovereign state whose court is adjudicating the dispute. While it should not be assumed that the multinational codes subscribed to by various nations do not complement or even occasionally comprise international law, courts generally must look to domestic rather than international legal sources for resolving corporate veil-piercing issues in cases involving the transnational, multicorporate enterprise.¹⁶

¹¹ 1970 I.C.J. 3 (judgment of Feb. 5).

¹² *Id.* at 42.

¹³ BLUMBERG, *supra* note 2, § 20.02, at 408.

¹⁴ Park, *Fiscal Jurisdiction and Accrual Basis Taxation: Lifting the Corporate Veil to Tax Foreign Company Profits*, 78 COLUM. L. REV. 1609, 1646 (1978).

¹⁵ See Horn, *supra*, note 1. See also Stanley, *International Codes of Conduct for MNC's: A Skeptical View of the Process*, 30 AM. U. L. REV. 973, 996-1001 (1981); Coombe, *Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel*, 36 BUS. LAW. 11 (1980) (discussion of existing and proposed codes of conduct and their legal implications for the multinational enterprise); Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 3 (N. Horn ed. 1980).

¹⁶ American courts seem particularly reluctant at times to apply international legal principles to domestic disputes, since to do so "places an awesome duty on . . . courts to derive from an amorphous entity—i.e., the 'law of nations'—standards of liability applicable [to] concrete situations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984). *But see Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). This is not to suggest that international law derived from the collective decisions of courts around the world does not recognize or contemplate corporate veil-piercing principles. See, e.g., R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 210 (1977) (OECD Declaration of International Investment and Multinational Enterprises applied to specific veil-piercing case); B. HAWK, *UNITED STATES, COMMON MARKET*

B. Roots of the Conflict Between the Limited Liability and Veil-Piercing Doctrines

The rationale for judicial piercing of the corporate veil, while often taken for granted, is not always consistently articulated. In common law countries, and in an increasing number of civil law nations as well, courts have not always waited for legislative abrogation of limited liability. The United States Supreme Court provided the reason for this in *Bangor Punta Operations, Inc. v. Bangor & Arrostoock*:¹⁷ "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice when it is used to defeat an overriding public policy."¹⁸

The United States Supreme Court has also provided the principal rationale and leading American legal authority for refusal to pierce the veil of the multicorporate enterprise in *Cannon Manufacturing Co. v. Cudahy Packing Co.*¹⁹ Even though the case involved purely domestic parties, as well as domestic questions of fact and law, United States courts have frequently applied its rule in transnational legal disputes of similar type. Cannon brought a breach of contract action against Cudahy in North Carolina, Cannon's home state and the place where the contract was negotiated. Cannon tried to obtain jurisdiction over Cudahy, a Maine corporation, through a wholly owned Alabama subsidiary that had actually negotiated and signed the contract. Evidence indicated that Cudahy not only owned all the capital stock of its subsidiary, but also controlled its operations as if the subsidiary were an unincorporated branch or department.²⁰ Because Cudahy observed the formality of separate incorporation, however, the Court rejected the exercise of federal jurisdiction over the parent.

The Cannon Court stated that "Congress has not provided that a

AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 457 (1979) (discussing EC anti-trust veil-piercing principles); Baade, *supra* note 15, at 33-34 (Danish case involving OECD veil-piercing issues); Coombe, *Multinational Codes of Conduct—A New Dimension in Corporate Accountability*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1980 1, 9-10 (M. Landwehr ed. 1980) (Dutch court applying OECD principles); *Bayer v. Federal Cartel Office*, in 1 COMPANY LAW 52 (1980) (German antitrust veil-piercing case); Gordon, *Argentine Jurisprudence; Dellec Update*, 11 LAW. AM. 43 (1979) (Argentinian veil-piercing decisions); Gordon, *Argentine Jurisprudence: The Jurisprudence: The Parke-Davis and Dellec Cases*, 6 LAW. AM. 320 (1974); Nunziant, *Divestiture of Investments in Italy and Other European Countries*, in PRIVATE INVESTORS ABROAD IN 1981, 263, 273 (discussing European veil-piercing trends). These sources all refer either to various cases in which the courts decided to pierce the veil of a multinational corporation to reach its foreign affiliate; or to similar types of disputes resolved prior to entering the judicial process. In the OECD nations, veil-piercing seems to depend upon whether the subsidiary is solvent, a test not particularly favored by most American courts.

¹⁷ 417 U.S. 703 (1974).

¹⁸ *Id.* at 713.

¹⁹ 267 U.S. 333 (1925).

²⁰ *Id.* at 335.

corporation of one state should be amenable to suit in the federal court . . . whenever it employs a subsidiary corporation as the instrumentality for doing business therein."²¹ The Court sought to distinguish between the jurisdictional amenability to suit of the parent and its affiliate's potential liability for allegedly wrongful acts.²² A defendant incapable of suit in a given court for lack of jurisdiction, however, will probably escape judgment that imposes liability.

Cannon has never been overruled, and is still frequently cited to support decisions that refuse to pierce the corporate veil, albeit for somewhat different reasons. Subsequent courts, confronted with a choice between the rather rigid ruling and the need for "justice" alluded to in *Bangor Panta* have tended to favor the flexibility of justice over the rigidity of the ruling, but only with considerable analytical difficulty, because the two principles permit little room for compromise.²³ When read together, the two cases present a dilemma to a court called upon to resolve a dispute involving separate but affiliated corporate entities. While many federal decisions seem to treat *Cannon* as substantially modified, if not practically overruled, others show great deference to the *Cannon* espousment of the basic separate corporation principles.²⁴ *Cannon* no longer serves as binding precedent on the jurisdictional rule because of subsequent legal developments regarding the specific jurisdictional issues in the case.

²¹ *Id.* at 336.

²² *Id.* at 337. It should be noted that *Cannon* only applies to federal diversity jurisdiction over such suits, and it was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which dramatically changed the manner in which federal courts construed substantive laws and rights in causes of action rooted in state, rather than federal law.

²³ Typical of such efforts is *Roorda v. Volkswagenwerk, A.G. (VWAG)*, 481 F. Supp. 868 (D.S.C. 1979), a personal injury suit brought by a South Carolina citizen against VWAG, a German corporation, and various of its U.S. subsidiaries and affiliates, for harm suffered in California allegedly caused by VWAG's defectively manufactured automobile. The *Roorda* plaintiff sought jurisdiction over VWAG through its New Jersey subsidiary, which imported most of VWAG's automobiles into the United States. The court ruled that such jurisdiction existed, concluding:

It appears . . . that the great majority of the courts . . . involved with a parent-subsiary issue in which jurisdiction is sought over the parent, have not overruled *Cannon* but have found means to avoid the stringent *Cannon* principle in all instances when the parent completely dominates the activities of the subsidiary

Id. at 876. The *Roorda* court also noted that "it seems apparent to this court from multitudinous decisions of state and federal courts throughout the United States, that the principle announced twenty years later by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), changed the concept of jurisdiction and substantially eroded the stringent jurisdictional test applied in *Cannon*." The Supreme Court in *International Shoe* established a new test for personal jurisdiction based upon minimum contacts of the defendant with the forum state. Whether *Roorda* accurately reflects the current state of the *Cannon* rule remains subject to future Supreme Court clarification.

²⁴ See, e.g., *Snyder v. Hampton Indus., Inc.*, 521 F. Supp. 130 (D. Md. 1981); *Finance Co. of America v. Bankamerica Corp.*, 493 F. Supp. 895 (D. Md. 1980). While Dean Blumberg's observation that *Cannon's* influence is "unmistakably on the wane," he also notes that the authority is still strong, an observation borne out by numerous examples. BLUMBERG, *supra* note 2, at 44. For a general discussion of the case, see also *id.* at § 3.03.

Its formalism principle, which protects separate affiliated corporate legal identities from liability, not only remains viable but sustains the conflict with its doctrinal nemesis of piercing the corporate veil in the name of justice.

C. *Theories of Piercing the Corporate Veil*

The concept of "entity"²⁵ initially was developed to distinguish legally a sole corporation from its individual investor-shareholders, but has been extended to situations where a corporation has become a subsidiary or affiliate of a larger enterprise, which is itself a corporation separate from its shareholders.²⁶ The limited liability doctrine, which insulates from the acts of the corporation, all shareholders, whether natural or corporate persons, developed as a rule in support of the entity concept.²⁷ The entity concept and limited liability doctrine have evolved into a rule of hornbook law that mere ownership of a subsidiary doing business in a particular forum will not subject the parent to jurisdiction or liability there, as long as the formalities of separate corporate identity are maintained.

Exceptions to the traditional entity-limited liability rule have long existed to prevent corporate shareholders from achieving illegal or socially intolerable results through use of a corporate structure. These exceptions collectively comprise corporate veil-piercing law, although they are not always clearly identified as such. While there are substantial variations, veil-piercing responses may be divided into three distinct groups for analytical and illustrative purposes: veil-piercing by statute, by alter ego or instrumentality analysis, and under an enterprise or unitary business theory.

1. *Statutory Veil-Piercing*

An often overlooked exception to the limited liability rule, occurs frequently in the areas of greatest economic consequence to the multinational business enterprises.²⁸ In most substantive legal ar-

²⁵ See BLUMBERG, *supra* note 2, § 1.01.1, at 1-4.

²⁶ *Id.*, § 1.01.2, at 4-5.

²⁷ *Id.*, § 1.01.1, at 2. See also Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 618 (1975).

²⁸ To list some examples, U.S. federal securities and commodities laws presume that a parent or principal shareholder corporation can be liable for the misconduct of its corporate affiliates in any securities or commodities sale, issuance, registration, transfer, or exchange use. 15 U.S.C. §§ 78t (securities); 7 U.S.C. § 4 (commodities); see *infra* notes 192-209 and accompanying text.

U.S. export control laws impose substantial penalties upon not only American corporations but also their foreign affiliates for conduct in the sale of numerous technologically sophisticated products and systems. 50 U.S.C. §§ 2401-2420 (federal export control statutes). American banks are presumptively liable by statute for the acts of all their overseas banking subsidiaries and affiliates. 12 U.S.C. § 632 (federal bank statutes regarding Edge Act subsidiaries). For a related discussion, see *infra* notes 226-30 and accompanying text.

In an area that promises to become a fertile litigation field for multinational corpora-

eas, state laws parallel, and at times surpass, their federal counterparts in the imposition of legal obligations upon corporations for the acts of foreign affiliates. In virtually all of these areas, federal and state statutes or procedural rules prescribe the exercise of jurisdiction over any entity subject to liability under a corresponding substantive law.

Statutory veil-piercing generally assures uniform application of legal rules and standards, thus bringing predictability to judicial decision-making. The legislative branch has thus predated the judiciary in granting de facto enterprise analysis to the multinational company for liability, indicated in the discussion of recent trends and developments below.

2. Alter Ego-Instrumentality Analysis and Other Traditional Judicial Approaches

Absent statutory guidance to the contrary, courts generally recognize a heavy presumption that the separate corporate entity should be respected for all purposes. Once parent-subsidiary or affiliate relationships proceed beyond mere stock ownership, director nominations, and payment or receipt of dividends and other earnings, they become subject to closer judicial scrutiny of liability and jurisdictional issues. Two separate but related categories of such scrutiny become apparent; one based upon a "common identity" exception to the separate entity rule, where a parent and affiliate are treated as one entity for legal purposes because they act as one, and the other resulting from the purported existence of an "agency" relationship where the acts of one corporate entity are attributed to the other.²⁹

In deciding whether to pierce the veil for liability or jurisdiction purposes, courts using the traditional approach generally review factors regarding the identities, formalities, and status of the corporate affiliates to see if enough are present to signify parental control over its affiliate's conduct or commercial decisions.³⁰ A finding of such

tions with substantial American work forces, federal pension laws impose liability upon all solvent corporate affiliates for the pension obligations of insolvent or delinquent affiliates and even permit the assets of all affiliates to be used in calculation of the liability amounts, once certain stock ownership requirements have been met. 29 U.S.C. § 1301(b)(1), 1362. For a related discussion, see *infra* notes 212-14 and accompanying text.

Federal tax laws have long imposed tax liability upon American corporations for the income of their overseas subsidiaries and courts have acted liberally in reliance upon such statutes to subject all foreign subsidiary activities to their scrutiny and jurisdiction for collection enforcement purposes. Note, *State Taxation of Foreign Source Income through Worldwide Combined Reporting*, 17 VAND. J. TRANSNAT'L LAW 95, 103 & nn. 41-43 (1984) (discussing pertinent I.R.C. sections).

²⁹ BLUMBERG, *supra* note 2, § 1.02, at 9.

³⁰ These factors include: (1) stock ownership; (2) directors and officers common to both parent and subsidiary; (3) the financial relationship between parent and subsidiary, and whether the latter is economically autonomous from the former; (4) whether the par-

control will often justify a waiver of limited liability when the court determines that exercise of such control has resulted in illegality, fraud, or injustice. There is also a tendency to substitute "fundamental unfairness" for fraud or injustice and to define the former broadly enough to impose liability on a parent for failure to avert the insolvency of its subsidiary when such failure benefits the parent.³¹

This veil-piercing "analysis by checklist," accompanied by the search for fraud or injustice, has received sharp and well-founded criticism. This approach has been characterized as little more than "jurisprudence by metaphor or epithet," and there are few if any rational criteria to guide judicial weighing of the factors.³² For example, undercapitalization is one factor that always receives close attention by the courts and will almost always justify a piercing of the corporate veil. Unfortunately, in the absence of statutory requirements, undercapitalization is difficult to define and ostensibly could never apply to affiliates of the larger multinational enterprise.³³

The common identity analysis yields too many inconsistent judicial decisions. Courts predisposed to respect the corporate entity

ent subscribes to all or most of the capital stock, and whether the parent incorporated the subsidiary; (5) whether the subsidiary is grossly undercapitalized; (6) whether the parent pays salaries and expenses of subsidiary operations, and whether the parent guarantees or covers any of the subsidiary's financial losses; (7) whether the subsidiary has any business apart from that with the parent, and whether the subsidiary maintains any separate assets; (8) whether the parent treats the subsidiary as an unincorporated division or department; (9) whether subsidiary directors and officers have any autonomy from parental authority; (10) whether the formal legal prerequisites for separate incorporation are observed by the parent; (11) whether the parent treats the subsidiary's assets and property as its own. Barber, *Piercing the Corporate Veil*, 17 WILLIAMETTE L. REV. 371, 398 (1981) (quoting *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940)). See also BLUMBERG, *supra* note 2, at 16-19.

³¹ *Verreries de l'Hermitage, S.A. v. Hickory Furniture Co.*, 704 F.2d 140 (4th Cir. 1983); *Cunningham v. Rendezvous, Inc.*, 699 F.2d 676 (4th Cir. 1983); *Federal Deposit Insurance Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 2089 (1983) (use of insolvent subsidiary's assets to benefit its parent found fundamentally unfair).

³² BLUMBERG, *supra* note 2, at 7-8. His list of "metaphors" includes "adjunct," "agency," "agent," "alter ego," "conduit," "dummy," "instrumentality," "mere deportment," "pawn," "puppet," "shell," and "tool," the use of which generally signifies that a court believes the veil should be pierced. One commentator has concluded that the alter ego-instrumentality doctrine "has not developed into a cogent body of law" because the judicial desire to see justice done in every case, accompanied by the veil-piercing prerequisite "bad faith" conduct search, converts the analysis into a perfunctory exercise at best. Comment, *The Alter Ego Doctrine: Alternative Challenges to the Corporate Form*, 30 U.C.L.A. L. REV. 129, 139 (1982).

³³ Some courts now include an assets manipulation component in their capitalization analyses, which more closely approximates a reasonable test:

[W]here the controlling entity of one corporation siphons off the assets of that corporation into another controlled corporation in order to place the assets of a siphoned corporation beyond the reach of legitimate creditors, justice and equity decree that the Court should pierce the corporate veil with respect to these attempted transfers of assets in order to prevent . . . "reprehensible conduct."

Talen's Landing, Inc. v. M/V Venture II, 656 F.2d 1161 (5th Cir. 1981). *Accord* *North Pacific S.S. Co. v. Pyramid Ventures Group, Inc.*, 572 F. Supp. 1436 (E.D. La. 1983).

have generally ignored a subsidiary's often inherent lack of capacity to function independently from the parent. In such cases, piercing the veil for liability, jurisdiction, or some other legal purpose may require complete disregard of corporate formalities and fraudulent intent, and may cause an unjust result.³⁴ Adoption of these standards suggests that courts would never pierce the veil of the multinational enterprise, a result with little rational basis.³⁵ Furthermore, to these courts, not even unjust results are sufficient to find such a relationship between parents and their wholly owned subsidiaries.³⁶

Use of the agency theory to pierce the corporate veil has also been heavily criticized. When the subsidiary acts as the parent's agent by doing all the business the parent could do with its own unincorporated representatives, or vice versa, the agency theory requires the principal corporation to answer for the conduct of the agent. Defining an agency relationship within a large enterprise, however, is not simple. A literal application of the theory subsumes the doctrine of limited liability, and courts often confuse traditional agency law, which requires a formal agency agreement, with the multifaceted instrumentality and control analysis discussed above.³⁷

While use of a separate corporation to prevent legal liability is sufficient to support the finding of an agency relationship under this analysis, stock ownership and control by the parent through common directors may not be enough, although courts often have difficulty making a practical distinction.³⁸ Some courts refuse to find an

³⁴ BLUMBERG, *supra* note 2, § 1.02.1, at 11-13. See, e.g., *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 523-25 (9th Cir. 1984).

³⁵ In fact, at least one court has refused to pierce the corporate veil even where the "shell" corporation had no assets, was completely autonomous from its shareholders, and was without any formal corporate attribute other than its certificate, all classic symptoms of an alter ego relationship. *Brunswick Corp. v. Waxman*, 599 F.2d 34 (2d Cir. 1979).

³⁶ *A.G. Nelson v. International Paint Co.*, 734 F.2d 1084 (5th Cir. 1984). The court refused to find a common identity between parent and its wholly owned subsidiary in a products liability case where corporate formalities were met. The case was dismissed on limitations grounds, a harsh result that nevertheless may have been proper under application of state laws governing the dispute.

³⁷ Professor Seavey offers perhaps the most widely accepted position regarding an agency relationship between corporate affiliates:

A corporate subsidiary is not, as such, an agent of the parent company. The mere fact of stock ownership and a common board of directors does not make it one. One may become an agent, however, if it is employed by the parent to conduct its transactions. Further, if it is found that one exists only to disguise the parent's activities or prevent liability, the latter is responsible for its conduct as if it were an agent.

W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 10G (1964). Accord *RESTATEMENT (SECOND) OF AGENCY* § 14M reporter's notes at 68 (1958). But see BLUMBERG, *supra* note 2, § 1.02.2, at 20-23.

³⁸ In one of the more intriguing transnational cases, an American court explained how the theory might be applied:

The relationship of parent and subsidiary, though not by itself jurisdiction conferring, gives rise to an inference of a broad agency relationship between the two, even when, as here, it is the parent that is within the jurisdiction and

agency relationship unless the "significant decisions" of the subsidiary are approved by the parent, but offer little guidance for determining which decisions are significant.³⁹

The application of agency standards to alter ego analyses, and vice versa, is not the only example of legally inconsistent veil-piercing by the courts. To establish an alter ego or instrumentality relationship in all jurisdictions, and to establish an agency relationship in at least some of them, it is also necessary to prove that some degree of control exists and is exercised by one corporation over another. In some instances, courts will follow the statutory definition of control.⁴⁰ Occasionally, however, even statutory definitions will receive exceptionally narrow construction by courts committed to the preservation of legally separate corporate entities.⁴¹ When no statute exists, courts generally apply a far more rigorous definition.

The majority rule seems to be that a foreign parent corporation cannot be subject to a court's jurisdiction on the basis of a wholly owned subsidiary's presence as long as formal separation between the two is maintained, *unless* the parent conducts business within the forum through the subsidiary. Even conducting business in such a manner, however, normally will not subject the parent to liability for the subsidiary's conduct absent both total disregard of corporate formalities and a close relationship between the nature of the business conducted in the forum and the litigation.⁴² Most courts have not yet adopted the view for veil-piercing purposes that a parent controls the business of its subsidiary by the acts of stock ownership and voting, nomination of key personnel, and responsible management. *Copperweld v. Independence Tube Corp.*, however, suggests that mere ownership alone gives the parent and its wholly owned subsidiary a unity of identity for legal liability purposes.

Another theory of judicial abrogation of limited liability is the doctrine of intra-enterprise conspiracy.⁴³ Until the Supreme Court

not the subsidiary [T]he activities of the instate parent will confer jurisdiction under an agency theory if the corporation within the state 'does all the business which [the other corporation] could do were it here by its own officials.'

Jayne v. Royal Jordanian Airlines, 502 F. Supp. 848, 856 (S.D.N.Y. 1980).

³⁹ Translation Sys., Inc. v. Applied Technology Ventures, 559 F. Supp. 566, 567 (D. Md. 1983). A District of Columbia federal court recently refused to pierce the veil of a foreign subsidiary to reach an American parent absent a showing of fraud. The court held that the companies observed separate corporate formalities despite their agency relationship and virtual integration as part of an economic entity. Penick v. Frank E. Basil, Inc. of Delaware, 579 F. Supp. 160 (D.D.C. 1984).

⁴⁰ See *infra* notes 197-209 and accompanying text.

⁴¹ See *infra* notes 227-30 and accompanying text.

⁴² See Hargrave v. Fireboard Corp., 710 F.2d 1154, 1159 (5th Cir. 1983).

⁴³ Professor Hawk has referred to this as the "extensive albeit murky body of case law to the effect that a conspiracy may be found under certain circumstances between two related entities of a business enterprise where there has been separate incorporation, i.e., a

Copperweld decision,⁴⁴ some United States courts had particular fondness for this theory in antitrust cases. Even though *Copperweld* abrogated the doctrine for federal antitrust conspiracies between a parent and its wholly owned subsidiaries, the Court left open the issue whether other affiliated corporations could engage in unlawful antitrust conspiracies. Courts may therefore ostensibly apply this theory to other purported legal wrongs.⁴⁵ This is not veil-piercing in a strict sense, because it involves separate treatment of businesses holding themselves out as such. The assets of all corporate members of the enterprise, however, may be reached to satisfy a judgment when in the possession of enterprise co-conspirators, a result the doctrine of limited liability seeks to avoid.⁴⁶

3. *Veil-Piercing Under the Economic Enterprise or Unitary Business Theory*

General dissatisfaction with the inadequacy of veil-piercing analysis, reinforced by statutory schemes that foreclose a separate entity-limited liability rule, has created pressure for development of an alternative framework to resolve consistently affiliate corporation liability and jurisdiction questions. Some courts have responded by turning to enterprise analysis, which treats the corporate components of a company as one unit rather than as separate legal entities. It examines whether the various corporate affiliates comprising the enterprise have such a unity of purpose and "conduct interrelated operations as part of an integrated enterprise under common direction directed at the maximization of return for the group as a whole."⁴⁷ The degree of centralized control and economic integration, organization, market, and public identification as a unitary company are factors to be considered in using this theory.⁴⁸

Courts have used enterprise analysis in several types of legal disputes. The most significant involves a series of multinational company challenges to state income taxation laws assessing taxes on the basis of global income generated by all affiliates. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*⁴⁹ and its progeny have upheld the

parent-subsidiary or a subsidiary-subsidiary relationship." B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 89 (1982).

⁴⁴ 104 S. Ct. 2731 (1984).

⁴⁵ *Id.* at 2742.

⁴⁶ The basis for an intra-enterprise conspiracy is judicial acceptance of the theory that because business entities have opted to incorporate themselves separately, they warrant recognition as separate legal entities with regard to the burdens as well as the benefits of their actions. Once a conspiracy is established, joint and several liability is imposed upon all conspirators regardless of whether they are named as defendants. *See, e.g.,* *Instituto Bancario Italiano v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *In Re Uranium Antitrust Litigation*, 552 F. Supp. 518, 522 (N.D. Ill. 1982).

⁴⁷ BLUMBERG, *supra* note 2, § 1.03, at 24.

⁴⁸ *Id.*, § 22.06, at 460-61.

⁴⁹ 445 U.S. 425 (1980). *See also* BLUMBERG, *supra* note 2, § 22.03.5, at 440-41. A

constitutionality of such laws when applied to companies whose corporate components form a "single unitary business" or a functionally integrated enterprise. The rationale is that in certain multinational companies "many of these subsidiaries and affiliates . . . engage in business activities that form part of [an] *integrated . . . enterprise . . . a 'unitary business' . . . [supporting] the conclusion that most, if not all of its subsidiaries and affiliates contribute to appellant's worldwide . . . enterprise.*"⁵⁰

Another traditional category of enterprise analysis cases involves federal antitrust conspiracy issues. Although *Copperweld* only recently abrogated this doctrine, other federal appellate courts previously had refused to apply it on the premise that affiliated corporations, both treated internally and held out to the public as a single business entity, lack the prerequisite antitrust conspiracy capacity.⁵¹ *Copperweld* confirmed this principle, at least in those cases involving parents and their wholly owned subsidiaries. The Court laid ample groundwork, however, for future elimination of the separate corporate entity-limited liability rule for other types of legal disputes. It determined that for purposes of Sherman Act liability, a parent and its wholly owned subsidiary always have "a complete unity of interest" with common objectives and conduct because "the subsidiary [necessarily] acts for the benefit of the shareholder, its sole shareholder."⁵² The Court further concluded that a parent and its wholly owned subsidiaries have a unity of purpose regardless of whether the former maintains tight control over the latter, since the parent can always exercise full control when the subsidiary fails to act in the former's best interests.⁵³

The relationship between *Copperweld* and adoption of enterprise analysis in multinational company veil-piercing cases should not be overlooked. The *Copperweld* Court presumed the existence of unitary identity solely on the basis of stock ownership, a radical departure from traditional limited liability analyses. *Copperweld* also differs significantly from the unitary tax cases in which the Court has consist-

recent comprehensive analysis of state unitary taxation may be found in Note, *supra* note 28. See also *infra* notes 131-53 and accompanying text.

⁵⁰ *Mobil*, 445 U.S. at 435, 438-41 (emphasis added). Liability for foreign affiliate activities in such cases requires proof of functional integration, normally manifested by centralized management and close coordination of key affiliate business activities. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 224 (1980). This control must be actual, not potential, and cannot be measured by mere stock ownership. *F. W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico*, 458 U.S. 354, 362 (1982); *Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 321-25 (1982). There must be some nexus between the unitary business activities and the activities conducted in the forum. *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933, 2940-41 (1983).

⁵¹ *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1468-69 (9th Cir. 1983); *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965 (9th Cir. 1983).

⁵² *Copperweld*, 104 S. Ct. at 2742.

⁵³ *Id.*

ently held that lawful imposition of tax liability requires not only actual control, but actual integration of key business functions. Although it is tempting to limit *Copperweld* to intra-enterprise anti-trust conspiracies, such a narrow reading ignores *Copperweld's* basic premise that complete disregard of separate corporate entities is logical and acceptable in cases in which the economic activities of closely affiliated corporations are subject to challenge.

Post-*Copperweld* decisions have extended enterprise analysis to subsidiary corporations wholly owned by the same shareholder, as well as to two commonly owned subsidiaries plus a third corporation managed by the first two.⁵⁴ While these are federal antitrust cases, their reasoning may apply to others. In fact, federal courts had previously applied the same reasoning in federal collective bargaining litigation by determining that a corporation may be liable for an affiliate's collective bargaining obligations whenever the two entities have functionally integrated operations, centralized control over labor relations, common management personnel, and common ownership.⁵⁵

Another type of enterprise or unitary business case that cuts across various substantive areas involves the issue whether members of a business group, present in a particular forum in corporate form, may subject other members of the group to personal jurisdiction. The key question is whether the business group, which holds itself out as one common entity to the public, often through common and well-known trademarks or franchise identification, is present in a forum for personal jurisdiction purposes. If the nonforum company exercises some control over the use of its public identity and products by a forum company, the forum may have personal jurisdiction over the nonforum company.⁵⁶

"Enterprise veil-piercing" may be a misnomer, because the enterprise does not acquire legal identity until after the veil is pierced. In fact, however, enterprise analysis of liability and jurisdiction issues results from the notion that the principal purpose of a multicorporate business entity is to achieve the economic welfare of the group as a whole through the integrated and coordinated activities of the individual members. Application of enterprise analysis seems eminently more sensible than entity analysis and would yield far more consistency in judicial decision making if it were widely adopted.

⁵⁴ *Hood v. Tenneco-Texas Life Ins. Co.*, 739 F.2d 1012 (5th Cir. 1984); *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984).

⁵⁵ *Radio Union v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

⁵⁶ *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983); *Dickson v. Hertz Corp.*, 559 F. Supp. 1169, 1176 (D. Vt. 1983).

III. Transnational Veil-Piercing Litigation: Jurisdiction and Other Procedural Issues

Any transnational veil-piercing case requires resolution of several critical jurisdictional and other procedural issues. The court must decide whether to exercise subject matter jurisdiction over the dispute, and whether foreign or domestic law, or some combination, should govern. If the conduct occurs abroad, the injury is suffered abroad, and most of the parties are foreign, the court must decide whether to hear the dispute or grant a *forum non conveniens* dismissal. The Court must determine whether it is legally permissible to exercise personal jurisdiction over the foreign parties. Finally, the court must resolve other procedural issues related to venue and service of process, usually by applying some aspects of the various veil-piercing analyses.

A. Extraterritorial Application of Law and Subject Matter Jurisdiction

A state's right to regulate conduct by its own nationals occurring within the borders of another state is fairly well recognized in international law, although not without substantial debate.⁵⁷ The sovereign state may thus regulate the conduct of its own nationals, limited only by consideration of potential conflicts with the laws of other sovereigns. International law also recognizes the right of a state to punish or regulate conduct that occurs outside its territory, without respect to the nationality of the actors, if the conduct has a sufficiently adverse effect within its borders. The "effects" doctrine became a significant part of international jurisprudence in the *Case of the S.S. Lotus*,⁵⁸ decided by the Permanent Court of International Justice over a vigorous dissent.

The effects doctrine of extraterritorial application of law and the corresponding exercise of subject matter jurisdiction openly emerged in the United States in the international antitrust case *United States v. Aluminum Co. of America (Alcoa)*.⁵⁹ The court determined that the Sherman Act could be applied extraterritorially to govern the conduct of the Canadian affiliate of the Aluminum Cor-

⁵⁷ Nothstein and Ayres have noted:

A state's authority to regulate the extraterritorial conduct of its nationals involves no question of an international legal violation, but solely a question of the purport of the municipal law that establishes the duties of citizens in relation to their government. Thus, under existing international practice, a state is assumed to have practically unlimited legal control over its nationals. This competence can be justified on the basis of comity and because a state's treatment of its own nationals is not ordinarily a matter of concern to other states or to international law.

Nothstein & Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L.J. 1, 14 (1976) (footnotes omitted).

⁵⁸ (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7). For a discussion of this principle, see B. HAWK, *supra* note 16, at 12, 29.

⁵⁹ 148 F.2d 416 (2d Cir. 1945).

poration of America because of adverse effects on American foreign commerce.⁶⁰ The Supreme Court implicitly approved this doctrine in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,⁶¹ by applying the Sherman Act to a vanadium monopoly obtained by Union Carbide's Canadian affiliate to the detriment of a would-be American competitor.

Alcoa and *Continental Ore* stand for a rule that allows American courts to apply federal statutes to the activities of foreign corporations abroad if there are domestic effects, despite any apparent conflict with the laws of another sovereign. When applied to the transnational enterprise controlled by an American parent, this means that federal courts may legitimately regulate the conduct of foreign affiliates, which are often citizens of foreign states, whenever their conduct causes harm in the United States.⁶² Federal courts generally follow *Continental Ore* and *Alcoa* in exercising subject matter jurisdiction over federal antitrust disputes involving anticompetitive conduct abroad by foreign companies if there are adverse effects upon American foreign commerce.⁶³ Federal courts will also exercise subject matter jurisdiction in certain instances over federal securities law disputes, federal income tax and most grand jury proceedings, federal intellectual property export controls, and cer-

⁶⁰ *Id.* at 443-44.

⁶¹ 370 U.S. 690 (1962). See also *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (extraterritorial application of the Lanham Act, 15 U.S.C. §§ 1051-1127 (1982), to bar trademark infringement by American citizen in Mexico).

⁶² Despite the resulting potential conflict, the American Law Institute has endorsed the position that "[c]orporations formed under the laws of foreign states but owned or controlled by individuals or corporations who are nationals of the United States, are potentially subject to varying degrees of indirect control by the United States through its capacity to control its own nationals." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27, reporter's note (1965). Attempts to exercise jurisdiction over the conduct of foreign affiliates of American corporations by American courts can provoke substantial legal difficulty, however, since such efforts "may interfere with a [host country] state's economic regulation of the corporate entities created by its laws and operating primarily, or even exclusively, with its borders." *Park, supra* note 14, at 1612. This has caused some courts to reject the rigid *Alcoa* jurisdictional rule in favor of a multifaceted comity analysis that considers foreign policy repercussions from the exercise of jurisdiction. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); 1 J. Atwood, K. Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD, §§ 6.01-6.12 (1982). See also *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984) (refusing to apply federal commodities laws extraterritorially absent declarations of congressional intent).

⁶³ For a recent example of the effects theory of jurisdiction application, see *Laker Airways Ltd. v. Sabena Belgian World Airways*, 731 F.2d 909 (D.C. Cir. 1984). For cases refusing to exercise antitrust jurisdiction, see *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 574 F. Supp. 1453 (N.D. Cal. 1983). In federal antitrust cases, such forum effects are all but mandatory for American company exporting activities, since Congress amended section 7 of the Sherman Act, 15 U.S.C. § 6a (1982), to require a "direct, substantial, and reasonably foreseeable" effect on such trade. Import transactions are essentially presumed to have the forum effects required under the Act.

tain labor practices. Courts will do so where these practices violate statutes seeking to regulate a company's economic behavior even when the actors and conduct are predominantly foreign in nature, provided certain American nexus factors exist.⁶⁴

American courts are far less likely, however, to exercise jurisdiction in personal injury or contract disputes characterized by a dominant presence of foreign actors and conduct, unless United States law governs the dispute.⁶⁵ Courts generally use the multifactor contacts analysis test set out in *Lauritzen v. Larsen*⁶⁶ to determine the territorial scope of federal law. The analysis examines the interests advanced by the law in question and assesses the various contacts between the cause of action and the countries affected by the conduct.⁶⁷

While *Lauritzen* did not involve any issue related to limited shareholder liability, a subsequent Supreme Court case, *Hellenic Lines Ltd. v. Rhoditis*,⁶⁸ addressed this question. In a claim brought by a foreign seaman for injury suffered on board the vessel, the Court upheld United States jurisdiction and applied United States law, because the shipowner, although a foreign citizen, had its principal center of corporate activities and domicile in the United States. The Court thus looked to the principal place of business to determine the applicable law for contact and interest analysis.

Lauritzen and *Rhoditis* have significantly affected the limited liability rule in maritime tort cases and could have similar effects upon other types of legal disputes, given the recent extension to contracts negotiated and to be performed abroad, as well as to personal injury and other torts resulting in injury abroad. These cases often arise when foreign victims suffer injury outside the United States as a result of conduct by the foreign subsidiary or affiliate of an American parent corporation. Most courts confronted with such facts apply a *Lauritzen-Rhoditis* analysis and find that foreign law should govern the dispute. If the only significant tie to the United States is parental stock ownership and control, even when the latter is exercised, courts will generally refuse to apply American law to the dispute and

⁶⁴ See *infra* text accompanying note 209.

⁶⁵ See, e.g., *Edwards Co. v. Monogram Indus.*, 730 F.2d 977 (5th Cir. 1984)(en banc); *Walker v. Neugent*, 583 F.2d 163 (5th Cir. 1978), cert. denied, 441 U.S. 906 (1979).

⁶⁶ 345 U.S. 571 (1953).

⁶⁷ In *Lauritzen* the Court refused to apply the Jones Act, 46 U.S.C. § 688 (1982), to a foreign seaman who, after joining a ship's crew in New York, was injured in Cuba. The Court analyzed (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the allegiance and domicile of the injured party; (4) the allegiance of the shipowner; (5) the place of the labor contract; (6) the availability for a foreign forum; and (7) the law of the forum. It concluded that since the seaman and the ship were Danish, subject to Danish seaman's compensation law, Danish law would govern the dispute even though a federal court had the power to hear the case. 345 U.S. at 582-93.

⁶⁸ 398 U.S. 306 (1970).

will rely on the entity concept to support their decisions.⁶⁹ This is true even when an American corporation operates the instrumentality causing the injury through a shell subsidiary or affiliate deliberately created to avoid liability.⁷⁰

Not all United States courts, however, apply foreign law to disputes arising from the offshore conduct of American-based multinational companies. In a recent products liability case the court ruled that United States law applies whenever a domestic parent corporation actively participates in product development, testing, and marketing activities with its foreign subsidiary, a classic application of enterprise analysis to a choice of law decision.⁷¹ Application of United States law to these cases nonetheless reflects a decidedly minority view.

Traditionally, the choice of foreign law has not been particularly consequential in many disputes. United States courts are competent to apply foreign law to legal controversies as long as the party seeking its application is able to prove what law applies.⁷² Since veil-piercing is generally more customary under domestic than foreign law, American corporate defendants probably benefit when foreign law applies to cases involving potential American parent corporation liability for the conduct of foreign affiliates.

B. *Forum Conveniens* Dismissals of Transnational Veil-Piercing Disputes

An important recent development in American litigation of transnational disputes is the judicial revitalization of the *forum non conveniens* doctrine.⁷³ A decision to grant a *forum non conveniens* dis-

⁶⁹ Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984) (products liability action); Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1983) (maritime torts); Panama Processes, S.A. v. Cities Service Co., 650 F.2d 408 (2d Cir. 1981) (contract and fiduciary breach action); De Mateos v. Texaco, Inc., 562 F.2d 895 (3d Cir.), *cert. denied*, 435 U.S. 904 (1977).

⁷⁰ Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. 1984); Fajardo v. Tidewater, Inc., 707 F.2d 858 (5th Cir. 1983).

⁷¹ Anglo-Eastern Bulkships, Ltd. v. Ameron, Inc., 556 F. Supp. 1198, 1202-03 (S.D.N.Y. 1982). *See also* Hodson v. A. H. Robins Co., 715 F.2d 142 (4th Cir. 1983), *aff'd* 528 F. Supp. 809 (E.D. Va. 1981) (reviewing court held it was within trial court judge's discretion not to dismiss even though it thought foreign jurisdiction was more convenient); Haddad v. Richardson-Merrell, Inc., 588 F. Supp. 1158 (N.D. Ohio 1984); Manusamy v. McClelland Engineers, Inc., 579 F. Supp. 149 (E.D. Tex. 1984). For a recent opinion suggesting that *forum non conveniens* dismissals should be granted only rarely, see Lehman v. Humphrey Layman, Ltd., 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 708 (1984), which appears to be the exception rather than the rule.

⁷² *Manu Int'l, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 67 (2d Cir. 1981) (rejecting argument that choice of foreign law should support dismissal because American courts can competently apply it); *London Film Productions v. Intercontinental Communications, Inc.*, 580 F. Supp. 47, 50 (S.D.N.Y. 1984).

⁷³ Although the doctrine has long been a part of American jurisprudence, it was only sporadically applied to transnational disputes until 1980, when American federal courts began viewing it as a viable means for disposing of cases better tried for reasons of justice

missal, which presumes the existence of a more suitable alternative forum for hearing the dispute and, in fact, requires the existence of one, lies within the discretion of the court. Such a decision may be reversed on appeal only upon a finding of clear discretionary abuse.⁷⁴ The rule seems to be that if United States law governs the dispute in a United States federal court, the case will be heard there; application of foreign law in such a dispute, however, will probably result in *forum non conveniens* dismissal.⁷⁵ The presence or absence of American parental control over a foreign or American corporate affiliate responsible for the harm has been only a peripheral factor in most recent *forum non conveniens* determinations.

Forum non conveniens is inconsistent with enterprise analysis concepts, because courts applying the doctrine tend to ignore the degree of corporate interrelationships and control among affiliates in favor of judicial convenience. Courts applying enterprise analysis presume that it is neither unfair nor inconvenient to attribute the conduct or status of one corporate entity to all of its affiliates whose actions are relevant to the litigation, given sufficient economic integration among the affiliates. A middle ground between these two views would result in application of the more desirable aspects of each to transnational corporate veil-piercing disputes. If the nexus of a particular dispute is more foreign than domestic, and the difficulties of obtaining access to relevant witnesses and evidence as well as personal jurisdiction over all parties in a domestic court are found to be substantial, *forum non conveniens* probably can and should be applied in the interests of fairness and judicial economy. Where the degree of control and responsibility by the domestic corporation for the conduct of its foreign affiliate in causing the harm is significant, however, neither fairness nor convenience seems particularly appropriate, and the doctrine probably should not be applied. Judicious use of this doctrine can help bring about greater consistency in the multinational corporation veil-piercing cases.

C. Diversity of Citizenship Over the Alien Corporation

American federal courts possess jurisdiction limited to that defined in Article III, Section 2 of the Constitution. The two principal

or convenience outside the United States. *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir.) (en banc), cert. denied, 449 U.S. 890 (1980); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir.), cert. denied, 449 U.S. 890 (1980); *Calavo Growers v. Belgium*, 632 F.2d 963 (2d Cir. 1980). The Supreme Court then assured permanent application of the doctrine in the *Piper* litigation to dismiss a lawsuit arising from an airplane crash abroad. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

⁷⁴ *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 385 (5th Cir. 1983).

⁷⁵ *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845 (5th Cir. 1983) (noting that American law choice requires exercise of jurisdiction). *But see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981) (choice of law is not sole determinative factor of whether court should grant *forum non conveniens* dismissal).

bases of federal jurisdiction over cases involving multinational enterprise defendants are the diversity and federal question statutes. Maritime cases come under a separate federal admiralty jurisdiction statute, while foreign government owned corporations may only be sued in accordance with the Foreign Sovereign Immunity Act of 1976.⁷⁶

The statutory definition of corporate citizenship is particularly important in diversity cases, because with only limited exceptions, state substantive law governs all such suits in federal courts.⁷⁷ In effect, corporations are citizens of both their state of incorporation and their principal place of business, although identification of the latter is often difficult.⁷⁸ Federal statutes are silent, however, regarding alien corporation citizenship, and neither courts nor commentators agree on whether alien corporations are citizens only of their countries of incorporation, or whether they are also citizens of their principal place of business.⁷⁹ Resolution of such conflicts is of considerable importance because citizenship determines whether diversity exists.⁸⁰

It is now well settled in the United States that American subsidiary corporations, wholly owned by foreign parents, are citizens of the state where they are incorporated and possess American identity regardless of whether they have any actual autonomy of their own.⁸¹ Furthermore, the rule in diversity cases is that the citizenship of a parent company is not attributed to its subsidiary or vice versa,

⁷⁶ Pub. L. No. 94-583, 90 Stat. 2891 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982). 28 U.S.C. § 1332 (1982), the diversity jurisdiction statute, confers federal jurisdiction over all civil actions where the matter in controversy exceeds the value of \$10,000 and is between citizens of different states: citizens of a state and a foreign state or citizens or subjects thereof. 28 U.S.C. § 1331 (1982) confers federal jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States, without regard to the amount in controversy. 28 U.S.C. § 1333 (1982) confers exclusive federal court jurisdiction over all civil admiralty and maritime actions. For FSIA cases, see *infra* text accompanying notes 231-45.

⁷⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). This is true even when such cases are removed from state to federal court pursuant to federal statute. 28 U.S.C. § 1441 (1982). Section 1332(c) provides that a corporation is a citizen of both the state by which it has been incorporated and the state where it has its principal place of business. For a thorough discussion and analysis of federal diversity jurisdiction, see C. WRIGHT, *LAW OF FEDERAL COURTS* §§ 23-31 (3d ed. 1976).

⁷⁸ C. WRIGHT, *supra* note 77, at 104-05.

⁷⁹ Professor Wright suggests that corporations may be citizens of both places, while Professor Moore has written that an alien corporation may only be a citizen of its state of incorporation, a view supported by *Barcelona Traction*, which does not bind federal courts. *Id.* at 105; 1 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 0.75 [2,3], at 709.6-709.85 (2d ed. 1984). Courts are equally divided on this point. Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 COLUM. L. REV. 177, 178-79 (1984).

⁸⁰ Note, *supra* note 79, at 180-81 and cases discussed therein. For a clear illustration of the problem, compare *R.W. Sawant & Co. v. Ben Kozloff, Inc.*, 507 F. Supp. 614 (N.D. Ill. 1981), with *Transworld Hospital Supplies, Ltd. v. Hospital Corp. of America*, 542 F. Supp. 869 (M.D. Tenn. 1982).

⁸¹ *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

although at least one federal court has recently suggested that American incorporation alone may not have any legal significance if the real parties in interest are foreign parents that completely control the activities of their American affiliates.⁸² State substantive laws of limited liability govern the other veil-piercing issues in diversity cases once citizenship is determined under federal law.

In effect, corporations subject to United States law and jurisdiction must satisfy two distinct sovereigns in many instances, and foreign corporations must satisfy three or four, including the foreign state of incorporation, the principal place of business, the laws of the state in diversity cases, and often federal law as well. The laws of each of these places may affect the legality of the challenged conduct or the corporate actor, and there is no existing legal mechanism for assisting courts in resolving the inevitable conflicts among these laws.⁸³ Until courts use an enterprise view instead of a nationality standard, inconsistent decisions in multinational veil-piercing will continue to increase.

D. *Personal Jurisdiction Disputes Involving the Multinational Corporation*

Numerous American courts have assessed the "significance of the economic activities within the forum of one component of a corporate group as a basis for the assertion of jurisdiction over a foreign component," and their decisions "are conflicting and the overall patterns confusing."⁸⁴ This problem is particularly acute in cases involving personal jurisdiction over a foreign parent corporation on the basis of its domestic affiliate's forum presence.⁸⁵ Since most courts have not adopted the enterprise view, they tend to engage in highly subjective scrutinies and balancing tests to support their contradictory results. Such contradictions are unfortunate when the de-

⁸² *K & H Business Consultants, Ltd. v. Cheltonian, Ltd.*, 567 F. Supp. 420, 424 (D.N.J. 1983).

⁸³ One commentator has urged courts to "distinguish between the situations in which a corporation is used in any attempt to evade a federal policy and those in which it is used merely to take best advantage of legal options available to it," letting state law govern a corporation's internal affairs and federal common law govern any external affairs related to major federal policies. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 868, 871 (1982). While this suggestion might be viable in some situations, it does not fully eliminate conflicting or inconsistent veil-piercing decisions arising from similar factual patterns governed by identical policies. Furthermore, it offers little insight into how federal courts should distinguish between conflicting federal and state policies in diversity cases, particularly when important American foreign commerce issues are involved.

⁸⁴ BLUMBERG, *supra* note 2, § 3.01, at 40.

⁸⁵ Dean Blumberg notes that the assertion of jurisdiction in such instances receives nearly identical analysis to that given the issue whether jurisdiction should be exercised over a foreign affiliate for the forum presence of the domestic parent. He correctly identifies this similarity as consistent with the enterprise view that jurisdiction is proper over the enterprise "when any component is before the court." *Id.*, § 3.09, at 77-78.

defendants are affiliates of a large multinational enterprise, and one federal judge noted:

To any layman it would seem absurd that our courts could not obtain jurisdiction over a billion dollar multinational which is exploiting the critical . . . American markets to keep its home production going at a huge volume and profit. This perception must have a bearing on our evaluation of fairness. The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution.⁸⁶

It is for this reason that an alternative analytical framework for resolving such jurisdictional disputes is so sorely needed.

Personal jurisdiction analysis in the United States is divided into resolution of two distinct issues: whether personal jurisdiction may be constitutionally exercised, and whether a federal or state statute permits its exercise even when constitutional prerequisites are satisfied. The former is by far the more significant issue. Foreign corporate defendants cannot afford to overlook the importance of personal jurisdiction decisions, because defendants must submit to United States jurisdiction for discovery purposes to decide their amenability to suit. Otherwise, such defendants run the risk that the court will find the existence of jurisdiction as a sanction for failure to submit to such discovery.⁸⁷ Such a finding may then be used to support a default judgment for use in attachment of the company's assets.

The constitutionality of a court's exercise of personal jurisdiction depends upon a defendant's forum ties, and not those of the plaintiff or of the action itself.⁸⁸ The United States Supreme Court has indicated the standards of due process that a multinational enterprise might expect in United States products liability litigation. The Court has held that a court may constitutionally exercise personal jurisdiction over any corporation that delivers its products, directly or indirectly, into the stream of commerce of the forum state with the expectation that they will be purchased there by consumers.⁸⁹ Although the Supreme Court recently has refined some of the consti-

⁸⁶ *Hattori*, 508 F. Supp. at 1327. For an even more critical analysis of American judicial treatment of such decisions, see Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 87 (1983).

⁸⁷ *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982).

⁸⁸ *Rush v. Savchuk*, 444 U.S. 320 (1980). These ties, often referred to as "minimum contacts" with the forum, must be sufficient so that the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. This requires that the forum have a legitimate regulatory interest in defendant's actionable conduct, that a defendant have personally availed itself of the forum's laws and protections, and that the forum contacts support a finding that litigation arising from them is reasonably foreseeable there. *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁸⁹ *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

tutional principles underlying the exercise of personal jurisdiction, its decisions ultimately may create more confusion in veil-piercing cases. In two of its most recent cases, the Court determined that the exercise of such jurisdiction over alleged tortfeasors whose conduct is likely to have harmful effects in the forum where the victim lives and brings suit cannot offend due process, particularly where defendants have cognizable commercial presence there.⁹⁰ In one of the opinions, however, the Court chose to note that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly-owned subsidiary" and cautioned that each corporation's contacts should be individually assessed.⁹¹ This retreat to formalism, unnecessary for the opinion and quite contradictory to *Copperweld* principles, may cause confusion by converting *Cannon* formalism into a constitutional jurisdictional principle.

A decision with even greater potential significance to the multinational enterprise is *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁹² a products liability suit against an alien corporation. Defendant's American forum contacts consisted of contract negotiations in the American office of a foreign corporation employer, receipt of payment from checks drawn on a foreign bank, and the purchase of helicopter equipment and training services in the forum state.⁹³ The Court concluded that defendant lacked "continuous and systematic general business contacts" necessary to support the exercise of personal jurisdiction under a "general" personal jurisdiction theory. It further determined that the forum contacts were too unrelated to the personal injury cause of action to support jurisdiction under a narrower "specific" personal jurisdiction test.⁹⁴

Hall's impact on future personal jurisdiction decisions affecting alien corporate defendants is difficult to assess. At its narrowest, *Hall* states that unless an alien corporate defendant has a relatively permanent forum presence, it will not be amenable to personal jurisdiction there. An exception probably will be made when the litigation arises directly out of the defendant's contacts or presence, and the plaintiff pleads a "specific" personal jurisdiction theory on the basis of those contacts. This narrow reading would attribute the *Hall*

⁹⁰ *Calder v. Jones*, 104 S. Ct. 1482 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

⁹¹ *Keeton*, 104 S. Ct. at 1482 n.13 (citing *Consolidated Textile Co. v. Gregory*, 289 U.S. 85, 88 (1933); *Peterson v. Chicago, R.I. & P. Ry.*, 205 U.S. 364 (1907)).

⁹² 104 S. Ct. 1868 (1984).

⁹³ *Id.* at 1869-70.

⁹⁴ *Id.* at 1873 (citations omitted). The Court expressly rejected plaintiff's arguments that "mere purchases [in the forum], even if occurring at regular intervals," were sufficient to support a general jurisdiction theory, and revived a somewhat dated precedent to support its ruling that defendant's trips to negotiate the contract and make the purchases to perform it were also insufficient for general personal jurisdiction purposes. *Id.* at 1873-74 (relying upon *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923)).

dismissal to a pleading deficiency, which is an exceptionally harsh and uncommon result. Instead, Hall may be viewed as imposing a higher constitutional personal jurisdiction standard that requires more extensive analysis of the quality or nature of an alien corporation's forum contacts. Such an analysis can only increase judicial uncertainty and inconsistency because of the lack of objective criteria.

Applying *Hall* to an alien defendant corporation that belongs to a multinational enterprise with a domestic forum affiliate poses even greater uncertainty. *Hall* recognizes the constitutionality of exercising personal jurisdiction over an alien corporation that has continuous, systematic, and commercial forum contacts, regardless whether the litigation arises from those contacts. The decision, however, does not address the issue whether the alien corporation has a continuous, systematic commercial presence when its affiliate conducts business in the forum for the benefit of the enterprise as a whole. A court following *Copperweld* might reasonably conclude that the forum contacts of a wholly owned subsidiary are those of its parent, and vice versa, although this would perhaps conflict with the Supreme Court's admonition in *Keeton v. Hustler Magazine, Inc.*⁹⁵ that each corporation's contacts be considered separately. This may result in a finding that if the domestic corporation's forum presence is unrelated to the litigation, its alien affiliate may escape personal jurisdiction despite permanent forum contacts through the former. This result is supported by *Cannon* and *Keeton* principles, but is not likely to gain acceptance by the courts, because of its great potential abuse. Conversely, it is not certain that courts would abrogate such principles in favor of those espoused in *Copperweld*, unless they choose to adopt an enterprise analysis.

While derived from inconsistent legal opinions, these principles collectively form a rule that personal jurisdiction constitutionally may be exercised over a foreign corporation having sufficient minimum contacts. The rule, however, says nothing about how courts should determine whether such contacts exist. Any minimum contacts analysis becomes further complicated by the distinction between federal question and diversity jurisdiction decisions that involve personal jurisdictional issues.⁹⁶ Where Congress has not

⁹⁵ 104 S. Ct. 1473 (1984).

⁹⁶ Generally, in federal antitrust and securities cases, "any [federal] district court from Hawaii to Florida has jurisdiction over any defendant who has 'minimum contacts' with the United States, [regardless of] wherever those contacts may be." Smith, *No Forum At All or Any Forum You Choose: Personal Jurisdiction Over Aliens Under the Antitrust and Securities Law*, 39 BUS. LAW. 1685, 1695-96 (1984). This rule presumes an aggregation of contacts within the United States, which is permissible if the substantive federal claim is based upon a statutory scheme that provides for worldwide service of process. Lilly, *supra* note 86, at 87. This mixture of personal jurisdiction and service of process legal doctrines has been sharply criticized, but is nonetheless common. BLUMBERG, *supra* note 2, § 3.04.2, at 54-56. For a list of articles questioning the applicability of this rule to alien corporations, see *id.* at

provided for worldwide service of process, federal courts will either use a state long-arm statute or look to rule 4 of the Federal Rules of Civil Procedure to determine whether personal jurisdiction exists, although neither expressly provides for aggregation of national contacts for alien corporate defendants.⁹⁷ This approach has evoked concern that absent such aggregation, alien corporate defendants "are able to avoid establishing the requisite minimum contacts with any individual state by dealing only through small branches or sales representatives" or through affiliate corporations with limited or negligible forum presence in a particular state.⁹⁸

The "stream of commerce" analysis in *Worldwide Volkswagen Corp. v. Woodson*⁹⁹ was intended to clarify the due process standard by identifying the types of commercial activity or presence that could subject a company to jurisdiction. Instead, however, courts have been unable to agree on when a company's commercial activities are sufficient for jurisdictional purposes in similar cases.¹⁰⁰ *Nelson v. Park Industries, Inc.*,¹⁰¹ a products liability action brought against a Hong Kong manufacturer, its Hong Kong distributor, the American retailer, and its American insurer, is typical of decisions supporting jurisdiction over an alien corporation under a stream of commerce theory. The injury occurred in the United States where the product was sold by the retailer who had purchased it in Hong Kong. Finding jurisdiction over the manufacturer and distributor, the court concluded that "the relevant scope [of the foreseeable market] is

56 n.23. See also 18 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8644 (rev. perm. ed. 1983).

⁹⁷ Lilly, *supra* note 86, at 137-39, especially nn. 202-04.

⁹⁸ Note, *The Outer Limits of In Personam Jurisdiction Over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. LAW & ECON. 637, 638 (1982).

⁹⁹ 444 U.S. 286 (1980).

¹⁰⁰ For example, in two recent cases, *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984), *aff'g* 578 F. Supp. 530 (N.D. Iowa 1982), and *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A.*, 703 F.2d 143 (5th Cir. 1983), the courts held that even if a manufacturer could foresee the entry of its products into the American market, there may not be a reasonably foreseeable reason to anticipate litigation over their commercialization or use there. *Humble*, 727 F.2d at 710; *Talbot*, 703 F.2d at 145.

Other decisions, however, hold that foreign manufacturers who know their products will enter the American market or that their commercial activities will have direct effects enter the American stream of commerce for personal jurisdictional purposes and have no basis for complaint when sued on the basis of legal injury in the United States. See, e.g., *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983); *Raffaele v. Campagnie Generale Maritime*, 707 F.2d 395 (9th Cir. 1983); *Myers v. John Deere Ltd.*, 683 F.2d 270 (8th Cir. 1982) (personal injury actions arising from products made and shipped from abroad causing injury in the United States through negligent manufacture or loading). See also *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982); and *Brown v. Flowers Indus., Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1275 (1983) (defamation by nonresidents causing alleged forum injury). See also *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd.*, 647 F.2d 200 (D.C. Cir. 1981) (alleged trademark infringement where mere sale in forum supported jurisdiction).

¹⁰¹ 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984).

generally broader with respect to manufacturers and primary distributors who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market."¹⁰²

Adoption of *Nelson's* sensible view of personal jurisdiction would tend to favor an enterprise theory at the expense of an entity theory. Conflicting judicial opinions, however, have resulted. The *Hall* decision, which involved the commercialization of services into the American stream of commerce will probably create more conflicts and inconsistencies absent future clarification, because it suggests that a far more stringent test will apply. The stream of commerce theory of personal jurisdiction over alien commercial entities, like veil-piercing itself, has become a tool of judicial convenience to avoid "injustice" at the expense of certainty and consistency. If stream of commerce jurisdiction leads to contradictory results, personal jurisdiction on the basis of "minimum contacts," "conducting business" or "transacting business" in the forum is perhaps even more so.¹⁰³

Traditionally, the doing business standard has been the most stringent, and generally requires such contacts as retention of counsel, opening and maintenance of bank accounts, business solicitation, and financial negotiations.¹⁰⁴ Because most states have extended their long-arm statutes to due process limits, the three terms have evolved into a standard similar to minimum contacts. When the cause of action does not arise from forum contacts, however, or when the forum's law requires, courts must apply the more rigorous doing business analysis to determine whether exercise of personal jurisdiction meets due process.¹⁰⁵

¹⁰² *Id.* at 1125. *Accord* *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982) (finding personal jurisdiction over foreign trading company in products liability case on basis of anticipated market).

¹⁰³ These three terms are often used interchangeably by courts to reflect entirely different legal rules and concepts. Generally, "minimum contacts" refers to the constitutional standard for personal jurisdiction and signifies that a cause of action has arisen from the forum contacts, thus satisfying the "purposeful availment" requirement. *BLUMBERG, supra* note 2, § 6.03.1, at 152-55 & n.20. "Doing business" contemplates "a pattern of continuous and systematic activity within the forum" regardless of whether litigation arises from such contacts and refers both to state statutory standards and federal venue requirements. *Id.* at 150-51, 153. 28 U.S.C. § 1391(c) (1982) provides that federal venue exists in any action against a corporation in any district "in which it is incorporated or licensed to do business or is doing business." "Transacting business," a term incorporated in both the Uniform Interstate Act and the International Procedure Act used as the model for many state long-arm statutes, § 1.02, 13 U.L.A. 466 (1981 Supp.), and the federal antitrust venue statute, 15 U.S.C. § 22 (1982), may in fact be synonymous with "minimum contacts" in a practical sense, because it provides for personal jurisdiction on the basis of a single forum transaction if the cause of action arises from that transaction. *BLUMBERG, supra* note 2, § 6.03.2, at 156.

¹⁰⁴ *See, e.g.*, *Netherlands Shipmortgage Corp. v. Madris*, 717 F.2d 731, 740-41 (2d Cir. 1983) (New York standard).

¹⁰⁵ *BLUMBERG, supra* note 2, §§ 5.02, 7.02.5, at 104, 190-91. For a recent application

Often the most controversial and intensely litigated issue in any case involving affiliated corporate defendants is whether the conduct or presence of one corporation in a forum will support jurisdiction over an alien affiliate. Where presence and the litigation are interrelated, this is not so controversial, but as seen in *Hall*, when the forum contact and litigation are unrelated, courts will apply the more stringent doing business analysis to determine whether jurisdiction is proper.¹⁰⁶ Although mere alien parental ownership of stock in a domestic subsidiary does not constitute doing business, it can create an agency relationship that may support personal jurisdiction. Ownership plus domination of the domestic affiliate by the parent will probably meet the doing business standard under an alter ego theory on the notion that the foreign affiliate is doing business through its dominated subsidiary.¹⁰⁷

*Bulova Watch Co. v. K. Hattori & Co.*¹⁰⁸ is a well-reasoned attempt to resolve the issue of when a foreign corporation may be sued in federal court to answer for the legal wrongs of its domestic affiliate. Defendant, a Japanese conglomerate with heavy investments in timepiece manufacturing and distribution, owned all the stock of Seiko Corporation, an American subsidiary.¹⁰⁹ Plaintiff, a rival timepiece manufacturer and distributor, sued Hattori and its various American subsidiaries for unfair competition. In exercising jurisdiction over Hattori, the court found parental ownership of all subsidiary stock, overlapping directors and officers, intercompany loans, consolidated financial statements, joint publicity campaigns, and various other links joining Hattori to its American offspring.¹¹⁰

Hattori could not demonstrate any evidence, such as separate

of New York's rigorous "doing business" standard, see *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453 (E.D.N.Y. 1984). The court denied personal jurisdiction over a foreign parent, although the parent controlled a foreign-based subsidiary, because the litigation was not related to this relationship.

¹⁰⁶ Professor Fletcher identifies the problem inherent in such an analysis, noting that "existing case law as to what constitutes the requisite doing of business [between affiliated corporations for jurisdictional purposes] is in such a state of confusion," that it cannot easily be clarified because "the term is incapable of any satisfactory definition" and thus, standards for developing one may be derived only by analyzing "the facts of each case." W. FLETCHER, *supra* note 96, at § 8711.

¹⁰⁷ *Id.* at § 8721.

¹⁰⁸ 508 F. Supp. 1322 (S.D.N.Y. 1981).

¹⁰⁹ Seiko Corporation, in turn, owned all the stock of various domestic timepiece distribution and service corporations. Hattori was selling an estimated 400 million timepieces per year in the United States. *Id.* at 1329.

¹¹⁰ The court critically questioned whether such a multifaceted analysis is appropriate for determining whether to pierce the corporate veil, observing:

It would be helpful were the law to provide some grand jurisdictional ledger sheets upon which formal points such as these could be assigned weights and totaled up. That is not possible in our real world where so much depends on nuances, or on a sense of interrelationships and on a realistic appraisal of subtle economic and power connections. Real rather than formal relationships must be considered.

Id. at 1340.

manufacturing or research facilities of its subsidiaries, to refute the implication that its control over its subsidiaries was substantial enough to sustain jurisdiction and perhaps liability. The court based its jurisdictional analysis on an agency theory and noted that Hattori sought market penetration for its products through the use of subsidiary corporations.¹¹¹ The result, however, represents enterprise analysis principles.

Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,¹¹² a breach of contract and warranty action, followed *Hattori* reasoning to permit jurisdiction over a foreign parent through its domestic subsidiary. The court found jurisdiction over Toshiba-Japan because it conducted business through its wholly owned subsidiary and derived substantial profits from the United States market.¹¹³ The court expressly rejected the argument that the foreign parent could insulate itself from jurisdiction by creating a subsidiary, and held that where the parent must approve significant domestic subsidiary decisions, exercising jurisdiction over the parent is appropriate.¹¹⁴

In *Roorda v. Volkswagenwerk, A.G.*¹¹⁵ plaintiff sued Volkswagen of Germany (VWAG) for injuries caused in California by an allegedly defective car. The vehicle had numerous owners prior to plaintiff. The court determined, however, that VWAG was present in South Carolina for jurisdictional purposes through Volkswagen of America (VWOA), its United States importer.¹¹⁶ The court rejected a *Cannon* defense raised by VWAG that a parent could not be subject to federal jurisdiction on the basis of its subsidiary's activities, and instead found jurisdiction on the basis of fundamental fairness and due process.¹¹⁷ *Roorda* permits manufacturers to make a trade-off when they

¹¹¹ Judge Weinstein found that "these subsidiaries almost by definition are doing for their parent what their parent would otherwise have to do on its own. . . . [T]he subsidiaries' presence substitutes for the presence of the parent." *Id.* at 1342.

¹¹² 576 F. Supp. 312 (D. Md. 1983).

¹¹³ *Id.* at 320.

¹¹⁴ *Id.* at 320, 324. *Accord* *Brunswick Corp. v. Suzuki Motor Corp.*, 575 F. Supp. 1412, 1422 (E.D. Wis. 1983) (existence of parent-subsidiary relationships alone will not support jurisdiction over nonresident parent, but forum contact and substantial subsidiary activities under parental control in forum state will suffice). It should be noted that *Copperweld* presumes such control exists and will be exercised.

¹¹⁵ 481 F. Supp. 868 (D.S.C. 1979). See *supra* note 23 and accompanying text.

¹¹⁶ *Id.* at 870-71.

¹¹⁷ To support its decision, the *Roorda* court noted:

This court is not unmindful that the defense of litigation in a foreign jurisdiction is a burdensome inconvenience for any foreign corporation. However, such inconvenience is a part of the price that may properly be demanded of any corporation that extensively engages in international trade. When a foreign parent corporation so pervasively controls the activities of its subsidiary as the control exercised here by VWAG over VWOA, and consideration is given to the tremendous benefits from the business obtained through such a relationship, a foreign corporation like VWAG should not be heard to complain about the burden of defending litigation in this forum.

Id. at 881.

choose to do business through subsidiaries by relinquishing control over the subsidiary in return for the protection of limited liability.

*Jayne v. Royal Jordanian Airlines (ALIA)*¹¹⁸ represents one of the more unusual departures from the limited liability doctrine. Plaintiff filed suit against ALIA and Arab Wings, a foreign air charter corporation predominantly owned by ALIA, for a wrongful death allegedly caused by Arab Wings negligence during a flight abroad. Evidence indicated that Arab Wings never had any direct contact with the United States and that it maintained a fair degree of autonomy from ALIA. It received much of its business, however, through ALIA's marketing activities on its behalf in the United States, including prominent advertisements in the *Wall Street Journal*.¹¹⁹ The court therefore determined that jurisdiction over Arab Wings existed on the basis of an agency relationship.¹²⁰

These cases essentially rejected the entity view in favor of enterprise analysis to resolve personal jurisdiction disputes involving alien parent corporations, although enterprise analysis was not expressly mentioned in the opinions. The cases strike heavy blows against the shield of limited liability, because the courts did not pierce undercapitalized shells, but pierced fully operational marketing and sales corporations. This is destruction, rather than piercing of the veil, because most subsidiary corporations perform some service for the parents by mere existence. *Copperweld* supports a theory that a wholly owned domestic corporation is its parent for practical purposes because it lacks separate legal identity. Many courts have not accepted this view, however, and it does not appear likely they will do so.

Hargrave v. Fibreboard Corp.,¹²¹ an asbestos products liability action, is a clear recent example of the rejection of enterprise analysis in favor of entity analysis. In *Hargrave* the question arose whether under the forum state's law, a British parent's wholly owned American subsidiary could subject the parent to personal jurisdiction on the basis of the relationship.¹²² Although recognizing that a close parent-subsidiary relationship could support doing business jurisdiction over the parent, the court observed that the parental policy-making authority "was no more than that appropriate for a sole shareholder of a corporation."¹²³

¹¹⁸ 502 F. Supp. 848 (S.D.N.Y. 1980).

¹¹⁹ *Id.* at 859-60.

¹²⁰ *Id.* at 858-60.

¹²¹ 710 F.2d 1154 (5th Cir. 1983).

¹²² The *Hargrave* court reiterated the traditional rule that "[g]enerally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction." *Id.* at 1159 (citing 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 4.25[6], at 4-272 (2d ed. 1984)).

¹²³ *Id.* at 1161.

*Samuels v. BMW of North America, Inc.*¹²⁴ reached a similar result. Plaintiff sued the foreign manufacturer and its domestic affiliate for injuries caused by allegedly defective brakes. The court concluded that even when a foreign parent maintains all its commercial contacts in the forum through its domestic subsidiary, it is unreasonable to subject the parent to personal jurisdiction if the plaintiff had full right of redress against the subsidiary, unless the parent was a necessary party to the dispute.¹²⁵

The veil-piercing analysis in *Samuels* is probably unsound. The facts indicate that, but for the presence of its subsidiary, the parent would have been doing all of its own business in the forum. It is difficult to ascertain how the manufacturer avoids becoming a necessary party to such a case, because its subsidiary would have less knowledge of the brake manufacturing activities allegedly responsible for the injury than the parent. This may be one of the few instances in which a court determined that the presence of a solvent defendant meets the needs of justice, and saw no need to pierce the veil.

In *Kramer Motors, Inc. v. British Leyland, Ltd.*¹²⁶ plaintiff, a California British Leyland dealer, sued various affiliates of British Leyland, Ltd. of Great Britain, as well as the parent for illegally conspiring to deprive him of the dealership.¹²⁷ The court rejected an agency theory of jurisdiction, as well as an alter ego argument raised by plaintiff, on the ground that plaintiff failed to show that British Leyland exercised actual control over the affiliates' conduct. The court also refused to find jurisdiction based on the parent's contacts in the United States, which existed solely through subsidiary corporations, despite evidence indicating that British Leyland approved of the challenged marketing plan.¹²⁸ The holding is based on the finding that the various subsidiaries exercised autonomy over their marketing activities, and on concern over British Government ownership of most British Leyland stock.¹²⁹ *Kramer Motors* conflicts with cases such as *Hattori* and *Toshiba*, which found implied control sufficient to support exercise of personal jurisdiction over an alien parent. It nevertheless reflects the tendency of some courts to show greater deference to separate incorporation as a bar to piercing the veil in the absence of a strong showing that justice compels otherwise.

This tendency, rooted in *Cannon* principles, cannot be recon-

¹²⁴ 554 F. Supp. 1191 (E.D. Tex. 1983).

¹²⁵ *Id.* at 1193-94.

¹²⁶ 628 F.2d 1175 (9th Cir. 1980), *cert. denied*, 449 U.S. 1062 (1981).

¹²⁷ *Id.* Defendants included British Leyland, its foreign marketing subsidiary (also a British corporation), its United States importing subsidiary, and an American dealership wholly owned by the parent.

¹²⁸ *Id.* at 1177-78.

¹²⁹ *Id.*

ciled with decisions that reach contrary results, because in most such cases the multinational company defendants are highly integrated, closely coordinated unitary structures engaged in commercial activities through affiliated corporations in the forum. In virtually all of these cases, the legal disputes could not have arisen absent parental control over the conduct resulting in the injury. Applying enterprise analysis is a means of achieving consistent results, and there is little justification for lack of personal jurisdiction dismissals where parent corporations engage in substantial business activities in the United States through separately incorporated business entities. Adoption of the enterprise proposal would not affect the constitutional requirement that the domestic affiliate be amenable to personal jurisdiction in the forum under a minimum contracts-transacting business or even under a doing business standard, nor would it alter a sovereign's right to narrow the scope of parental jurisdiction by statute.

IV. Survey of Multinational Corporation Veil-Piercing Disputes by Area

A. Unitary Tax Litigation and the Enterprise Theory

The principal group of cases adopting enterprise analysis involves multinational company challenges to the rights of states to apportion state tax liability on the basis of global income "[w]ithout regard to entity and the class of corporate structure."¹³⁰ Various states partially calculate state tax liability on the basis of worldwide income reporting, which computes a corporation's tax base by totaling the income of all the corporation's affiliates throughout the world that comprise the "unitary business."¹³¹ A domestic corporation's apportionable tax base thus includes nonrepatriated foreign source income of its foreign affiliates.¹³²

In *Mobil Oil Corp. v. Commissioner of Taxes*¹³³ the Supreme Court carved out a broad exception to the limited liability doctrine otherwise applicable to the individual corporate affiliates of a transnational company. It rejected the constitutional challenge to a state assessment against a corporation doing business in the state on the basis of income from its corporate affiliates outside the state. Finding that Mobil was one large economically integrated taxation unit, the Court rejected Mobil's arguments that a state should not be allowed to tax the activities of Mobil's foreign affiliates either because they lacked any meaningful nexus with the state or because such taxation impedes United States foreign commerce. The Court further

¹³⁰ BLUMBERG, *supra* note 2, § 22.03.5, at 439.

¹³¹ Note, *supra* note 28, at 96.

¹³² *Id.*

¹³³ 445 U.S. 425 (1980).

noted that for tax calculation purposes, a state could look to "contributions to income resulting from functional integration, centralization of management, and economies of scale."¹³⁴

The Court ruled that Mobil had the burden of showing that the "foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont."¹³⁵ In language specifically directed at the multinational corporation controlled by a holding company, the Court determined that "[s]o long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. *One must look principally at the underlying activity, not the form of investment,*" to determine tax liability.¹³⁶

Shortly after deciding *Mobil*, the Court reviewed a somewhat similar state tax law in *Exxon Corp. v. Wisconsin Department of Revenue*.¹³⁷ It concluded that a state constitutionally may impose taxes on an entire enterprise if the entity functions as "a highly integrated business which benefits from an umbrella of centralized management and controlled interaction."¹³⁸ *Mobil* and *Exxon* thus laid the groundwork for a legal liability rule premised on the unitary business concept by treating the parent and subsidiary corporations as one entity if characterized by common ownership and operations that result in high levels of functional integration, centralized management, and economies of scale.¹³⁹

Two years after *Exxon* and *Mobil*, the Court again reviewed the unitary business issue in *Asarco, Inc. v. Idaho State Tax Commission*¹⁴⁰ and *F.W. Woolworth Co. v. Taxation and Revenue Department of New York*.¹⁴¹ *Asarco* involved state calculation of a domestic corporation's tax liability on passive income paid by overseas corporations to their domestic affiliate within a large mining conglomerate. While the Court reaffirmed its *Mobil-Exxon* support of the legality of unitary business tax liability as "the linchpin of apportionability in the field," it nevertheless voided the state's inclusion of *Asarco* dividends, interest, and capital gains income from foreign affiliates. It held that these affiliates were "discrete business enterprises"¹⁴² insufficiently

¹³⁴ *Id.* at 438.

¹³⁵ *Id.* at 439.

¹³⁶ *Id.* at 440 (emphasis added). Finally, the Court stated that the form of business organization may have nothing to do with the underlying unity of diversity of business enterprise. [When one chooses] to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that imposition of tax liability on such an enterprise would be legal. *Id.* at 440-41.

¹³⁷ 447 U.S. 207 (1980).

¹³⁸ *Id.* at 224.

¹³⁹ Note, *supra* note 28, at 118.

¹⁴⁰ 458 U.S. 307 (1982).

¹⁴¹ 458 U.S. 354 (1982).

¹⁴² See *Asarco*, 458 U.S. at 321-22.

connected with the forum to constitute a unitary business with the domestic affiliate.

The domestic corporation in *Asarco* shared few common officers or key employees with the affiliates, infrequently engaged in commercial transactions with them, and in some instances, either contractually waived its right to exercise voting control over or owned only a minority of shares of the affiliates.¹⁴³ The Court's principal concern was whether apportionment and taxation on such income would violate due process.¹⁴⁴ The Court found no outward functional integration connecting the foreign affiliates' activities to the taxing state, and thus rejected the unitary theory as a basis for liability.¹⁴⁵

Woolworth involved the somewhat different issue whether a state could tax a domestic retailing corporation on the basis of "potential" business benefits from the assets and income of its overseas retailing affiliates accrued by ownership of the affiliates' stock. The Court found virtually no functional integration among domestic and foreign affiliates, because the latter had substantial autonomy over all important business decisions, including those related to finance, personnel, and management.¹⁴⁶ The Court further concluded that retailing companies, unlike petroleum enterprises, were probably not suited to treatment as unitary businesses.¹⁴⁷

Subsequent to *Asarco* and *Woolworth*, the Court again addressed the unitary taxation issue in *Container Corp. of America v. Franchise Tax Board*.¹⁴⁸ It upheld the lower court's findings that a unitary business existed because of close financial interrelationships between domestic and foreign affiliates. There was also close parental involvement in the foreign affiliate's managerial affairs through establishment of "general standards of professionalism, profitability and ethical practices" by domestic corporation officers charged with overseeing their

¹⁴³ See *id.* at 320-24.

¹⁴⁴ See *id.* at 326.

¹⁴⁵ See *id.* In a significant aspect of the opinion, the Court rejected the state's argument that a common corporate purpose, manifested by transfer of intangible income to enhance the profitability and overall economic well-being of the domestic parent, was sufficient to define unitary business. The Court stated:

This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently, all of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of the unitary business limitation becomes no limitation at all. When less ambitious interpretations are employed, the result is simply arbitrary.

Id. at 326.

¹⁴⁶ *Id.* at 367-68.

¹⁴⁷ *Id.*

¹⁴⁸ 103 S. Ct. 2933 (1983).

subsidiaries' operations.¹⁴⁹ The Court seemed particularly impressed with the "flow of value" argument that parental provision of low interest loans, free technical assistance and services, and imposition of management standards combined to meet a reasonable unitary business finding. It also rejected the company's efforts to require a "substantial flow of goods" as a prerequisite to such a finding.¹⁵⁰

Distinguishing the Supreme Court unitary business decisions is not as easy as it appears at first glance. A unitary business may be found for state tax liability purposes if a domestic corporation has both the power to control its overseas subsidiary's activities and exercises that power; if parental and subsidiary business operations are closely integrated, as manifested by liberal intra-enterprise transfers of personnel, capital, goods or services, and cash flow; and if it appears that the subsidiaries are dependent upon the domestic affiliate for continued existence, or vice versa. These conditions are probably more likely to characterize manufacturing companies that market and distribute their own products, and are less likely to characterize retailing companies or enterprises that have high levels of local subsidiary autonomy.

Several state courts have ruled on the legality of unitary tax schemes within the context of the Supreme Court guidelines.¹⁵¹ One such decision rejects the argument that a conglomerate that exists principally to acquire and divest other companies can constitute a unitary business on the basis of common identity among its affiliate companies accompanied by upward profit flow to the conglomerate.¹⁵² This rejection of the *Container Corp.* "flow of value" reasoning could make it difficult for any business, other than a completely and vertically integrated one, to meet the unitary business definition. Foreign-based multinational companies subject to unitary business tax treatment have thus far unsuccessfully argued that they should be treated as a unitary business for other purposes, a view that is conceptually sound in light of *Copperweld*.¹⁵³

¹⁴⁹ *Id.* at 2944.

¹⁵⁰ *Id.* at 2947.

¹⁵¹ See, e.g., *Comm'r of Revenue v. Associated Dry Goods*, 347 N.W.2d 36 (Minn. 1984) (appeal pending); *PMD Investment Co. v. Dep't of Revenue*, 216 Neb. 553, 345 N.W.2d 815 (1984); *Comptroller v. Ramsay, Scarlett & Co.*, 58 Md. App. 327, 473 A.2d 469 (1984); *Brown Group, Inc. v. Admin. Hearing Comm'n*, 649 S.W.2d 874 (Mo. 1983) (en banc).

¹⁵² *James v. Int'l Tel. & Tel. Corp.*, 654 S.W.2d 865 (Mo. 1983) (en banc).

¹⁵³ See *Capitol Industries-EMI v. Bennett*, 681 F.2d 1107 (9th Cir.), cert. denied, 459 U.S. 1087 (1982). See also *Alcan Aluminum Ltd. v. Dep't of Revenue*, 724 F.2d 1294 (7th Cir. 1984); *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir. 1983), cert. denied sub nom. *Shell Petroleum N.V. v. Franchotti*, 104 S. Ct. 537 (1984); *EMI Ltd. v. Bennett*, 560 F. Supp. 134 (N.D. Cal. 1982), aff'd, 738 F.2d 994 (9th Cir. 1984). Each of the above courts held that a foreign parent corporation did not have standing to sue for indirect harm suffered from taxation of a domestic subsidiary.

Enterprise analysis of veil-piercing issues is consistent with the unitary tax scheme adopted by the Supreme Court with certain modification. This scheme presumes the unitary nature of a multicorporate, multinational business entity for liability and jurisdictional purposes given sufficient functional economic integration levels and a reasonable nexus between forum and nonforum commercial activities. The Court's unitary tax scheme is not altogether ideal for analyzing other types of transnational veil-piercing issues, however, because of the tendency to find unitary businesses only among vertically integrated manufacturers and not among most other types of companies. Furthermore, unitary tax assessment forum nexus requirements cannot be easily equated with constitutional personal jurisdiction prerequisites in nontax cases, because the latter are far more easily satisfied. Nonetheless, the unitary business analysis developed by the Court in these tax cases offers a sound conceptual starting point for resolving transnational corporate veil-piercing disputes by enterprise analysis.

B. American Judicial Enforcement Proceedings and Discovery Issues

Two categories of litigation have arisen over the extent to which United States laws and judicial power may penalize domestic corporations and their foreign affiliates for failure of either or both to comply with court orders resulting from conduct abroad by the foreign affiliates. The first involves efforts by United States government agencies to obtain information relevant to federal tax, antitrust, securities, or other types of investigations that can subject corporate members of an enterprise group to potential criminal as well as civil liability. The second category of cases involves judicial sanctions imposed for failure of private litigants to comply with discovery requests or orders.

In general, a parent corporation lawfully before a federal court cannot refuse to respond to discovery requests regarding information or documentation of a subsidiary merely because the latter is not a party. In such a situation, as long as common control exists between or among affiliates subject to the dispute, the court will impose a compliance duty.¹⁵⁴ Where discovery is to be conducted abroad or has extraterritorial legal consequences, courts must also consider the policies and interests of foreign states to determine if discovery is appropriate, especially when foreign law forbids discovery compliance.¹⁵⁵ When noncompliance results from a corporation's unwillingness to violate foreign law, courts generally assess the strength of such reasoning in determining imposition of noncompliance sanctions, but almost always require discovery compliance re-

¹⁵⁴ BLUMBERG, *supra* note 2, § 10.03 to 10.03.3, at 240-44 & n.19.

¹⁵⁵ *Id.*, § 10.04.1, at 245-47.

ardless of foreign law consequences, as well as disregarding the corporate entity.

*United States v. Vetco*¹⁵⁶ illustrates the extent to which federal law may reach the activities of foreign affiliates of United States corporations. *Vetco* involved the issue whether a federal court should enforce a summons from the Internal Revenue Service in a criminal tax investigation of an American corporation and its Swiss subsidiary.¹⁵⁷ *Vetco* refused to disclose essential financial data about the subsidiary on the ground that to do so would violate Swiss laws, which bar such disclosure by or about Swiss business enterprises.¹⁵⁸ The court rejected *Vetco's* foreign illegality defense and balanced the competing interests of the Swiss Government in requiring secrecy against those of the United States in requiring disclosure.¹⁵⁹ It found that *Vetco* failed to prove it could be successfully prosecuted in Switzerland for its acts performed in the United States, or that anyone allegedly protected by the Swiss confidentiality statutes would legitimately protest disclosure.¹⁶⁰

In another California federal tax case, *United States v. Toyota Motor Corp.*,¹⁶¹ the IRS issued a summons for information to Toyota's Japanese parent following an audit of that corporation's business activities with its American subsidiary.¹⁶² Toyota-Japan challenged the personal jurisdiction of the court, but the court ruled that an agency or alter ego jurisdictional analysis has no relationship to a congressional mandate that personal jurisdiction be exercised over a corporation for IRS summons enforcement purposes wherever such corporation is "found" in the broadest possible sense.¹⁶³ By imposing jurisdiction over a foreign corporation on the basis of whether it is "found" in the forum, Congress virtually assures an automatic

¹⁵⁶ 644 F.2d 1324, *modified*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

¹⁵⁷ The Internal Revenue Code provides that foreign subsidiaries predominantly owned by American parents are subject to federal tax liability. I.R.C. §§ 951-64 (1975).

¹⁵⁸ Article 273 of the Swiss Penal Code provides for a fine and imprisonment for disclosure of business secrets by or about Swiss businesses to foreign government agencies. *Vetco* also claimed that an agreement between the United States and Switzerland, the Convention on Double Taxation of Income, May 24, 1951, United States-Switzerland, 2 U.S.T. 1751, 1760-61, T.I.A.S. No. 2316, art. XVI(3), prohibited tax enforcement measures by one country when they conflicted with the public laws or policies of the other. The court here narrowly construed this provision to avoid its application to the case.

¹⁵⁹ *See Vetco*, 691 F.2d at 1286-91.

¹⁶⁰ In an inconspicuous footnote with interesting future implications, the court noted that while the United States Government merited considerable judicial deference to valid enforcement of governmental policies, private litigants might not receive the same degree of deference. *See id.* at 1289 n.9.

¹⁶¹ 561 F. Supp. 354 (C.D. Cal. 1983).

¹⁶² The IRS issued the summons pursuant to its statutory powers to conduct tax audits of two or more companies engaged in joint business activities. *See* I.R.C. § 482 (1975).

¹⁶³ 26 U.S.C. § 7604(a) (1976). *See Toyota Motor Corp.*, 561 F. Supp. at 357-59 (providing that the IRS may bring a petition to enforce a summons in the "district court for the district in which [the person summoned] resides or is found").

piercing of the corporate veil in federal tax liability cases if the corporation has a domestic affiliate there.

The most prominent of the growing number of grand jury cases involving various affiliates of the multinational enterprise is *In re Marc Rich & Co. v. United States*.¹⁶⁴ The federal government decided to investigate the tax consequences of various global petroleum and commodities transactions engaged in by the numerous alien and domestic affiliate corporations controlled by Marc Rich and his business associates. The investigation eventually was turned over to a grand jury, which issued a subpoena *duces tecum* to the principal American subsidiary, ordering production of all documents and records applicable to the tax consequences of the entire company's petroleum transactions. The American subsidiary refused to comply, and the district court issued a contempt order against both the subsidiary and its principal Swiss affiliate. The Second Circuit found subject matter jurisdiction on the basis of potentially adverse forum effects caused by the alleged tax nonpayment, thus reaffirming principles of territorial effects and protective jurisdiction.¹⁶⁵ The court then found personal jurisdiction over the Swiss corporation on the basis of its close ties to the American affiliate and the commission of at least one forum act through the latter in the furtherance of a conspiracy.¹⁶⁶

As in *Vetco*, the Swiss corporation in *Marc Rich* argued that submission of the records by the foreign parent would violate Swiss secrecy laws, and that a grand jury proceeding was an inappropriate means of seeking production or supporting a contempt order based upon failure to produce the documents. The court made short shrift of these arguments: "It would be strange, indeed, if the United States could punish a foreign corporation for violating its criminal laws . . . but a federal grand jury could not investigate to ascertain the probability that a crime had taken place."¹⁶⁷ The grand jury can essentially trigger the exercise of subject matter and personal jurisdiction over a foreign corporation through its domestic affiliate by finding that adverse forum effects occurred in part through concerted action between the two entities.

It should not be assumed, however, that government investigations will always result in sanctions for failure of domestic or foreign corporate affiliates to comply with enforcement proceedings. In *United States v. First National Bank of Chicago*¹⁶⁸ the Seventh Circuit reversed a lower court summons enforcement order for an American

¹⁶⁴ 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S. Ct. 3555 (1983).

¹⁶⁵ *Id.* at 666-67.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 666 (citations omitted). *Accord* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

¹⁶⁸ 699 F.2d 341 (7th Cir. 1983).

bank to produce certain tax-related documentation from its Greek branch. The bank showed that compliance would probably subject its Greek employees, and anyone else subject to Greek jurisdiction, to serious criminal penalties. The court did order the American bank to make a good faith compliance effort by seeking a waiver from prosecution, a normal means of dealing with the foreign law prosecution defense.¹⁶⁹

It is generally necessary to make a good faith effort to prove, by the testimony of expert foreign counsel, that compliance with the order is actually a violation of foreign law and will likely result in prosecution. It is also necessary to seek a judicial or foreign governmental prosecution waiver.¹⁷⁰ Even when these steps are taken, however, some federal courts may still decide that United States law enforcement policies deserve greater deference than foreign legal considerations. In a recent IRS summons enforcement proceeding against a major New York bank to obtain Hong Kong banking records, the court acknowledged that compliance might result in violation of Hong Kong bank secrecy laws. It nonetheless concluded that "the interest of the United States in enforcing its tax laws *significantly* outweighs Hong Kong's interest in preserving bank secrecy."¹⁷¹

In *United States v. Firestone Tire & Rubber Co.*¹⁷² the court was more reluctant to pierce the corporate veil to impose potential criminal liability on an American parent for the conduct of its Swiss subsidiary. Firestone created a wholly owned Swiss banking corporation to handle various European and Eurodollar transactions. When the bank began buying and selling gold through its self-created brokerage firms, the United States Government launched an investigation of Firestone in the United States for potential violations of the Gold Act of 1934.¹⁷³ The bank, which was found to control the brokerage firms, had acted in strict compliance with Swiss banking law and had not applied for a license because disclosure of certain information on the permit forms would have run afoul of Swiss banking confidentiality statutes. The court held that the Government failed to prove that

¹⁶⁹ *Id.* at 345.

¹⁷⁰ *Id.* The Eleventh Circuit, however, has rejected this defense on several occasions. See *United States v. Hayes*, 722 F.2d 723 (11th Cir. 1984) (defense denied where American corporation failed to enforce agreement to turn over documents in foreign court); *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983) (defense denied where foreign bank failed to seek judicial waiver of secrecy laws to permit financial records production).

¹⁷¹ *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 796 (S.D.N.Y. 1984). *Accord In re Grand Jury* 81-2, 550 F. Supp. 24 (W.D. Mich. 1982) (fact that bank records were in Germany did not put them beyond jurisdictional reach of grand jury subpoenas and orders of district court given continuous and systematic presence of bank in the United States).

¹⁷² 518 F. Supp. 1021 (N.D. Ohio 1980).

¹⁷³ The Gold Act barred gold speculation by persons subject to American law who failed to obtain a license from the Treasury Department. See 31 U.S.C. § 442 (1970) (repealed). See also 31 C.F.R. § 54.1-.83 (1970) for regulations then in effect.

the bank, and thus the brokerage houses, were in fact instrumentalities of the parent, rather than affiliates with which the parent conducted arms-length dealings.¹⁷⁴ Because Swiss law prohibited Firestone from interfering in any way with the bank's gold transactions, the court presumed that Firestone maintained its corporate distance in the absence of contrary evidence.¹⁷⁵

Firestone is not easily reconciled with the *Vetco* and *Toyota* line of cases. *Firestone* suggests that the unitary business theory used to impose tax liability in *Mobil* and *Exxon* may not apply when the enterprise can show that its affiliates constitute legally autonomous units in their respective countries of incorporation, but this seems to be nothing more than judicial preference for the form of appearance over the substance of actual conduct.

Theoretically, there should be little difference between noncompliance with a discovery order in an enforcement proceeding and a similar order in civil litigation involving private parties. For example, in *Soletanche and Rodio, Inc. v. Brown and Lambrecht Earth Movers, Inc.*,¹⁷⁶ a patent infringement suit brought by the American subsidiary of a French parent, which owned the patent and licensed its use to the plaintiff, the court ordered the parent to respond to defendant's interrogatories, although such disclosure violated French trade secrets laws. The court found that waivers from prosecution could be obtained by executive order and gave the parent time to seek them before imposing sanctions.¹⁷⁷ As *Vetco* suggests, however, courts probably will be more willing to render decisions that conflict with the laws of another sovereign at the request of their own sovereign than in response to private legal disputes.

A particularly heated controversy has erupted over the extent to which American litigation discovery abroad must comply with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹⁷⁸ Hague Convention decisions are important

¹⁷⁴ 518 F. Supp. at 1040.

¹⁷⁵ *Id.* at 1039-40.

¹⁷⁶ 99 F.R.D. 269 (N.D. Ill. 1983).

¹⁷⁷ *Id.* at 272-73.

¹⁷⁸ Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (text reprinted at 28 U.S.C. § 1781 (Supp. 1981)). Some courts have ruled that the party seeking such discovery must adhere to the Convention rules regarding the taking of evidence through letters rogatory even when the foreign country law may well bar compliance, on the theory that the Convention is an international agreement binding upon the United States. *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983). Other courts have reached contrary results by reasoning that "it is a mistake . . . to view the Convention as an international agreement to protect foreign nations from American discovery when they are parties properly before American courts" because the Convention and Federal Rules of Civil Procedure pertaining to discovery are in 'fundamental conflict with one another' and thus force the court to choose the latter over the former to protect its jurisdictional powers." *See Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 519-20 (N.D. Ill. 1984); *see also Laker Airways Ltd. v. Union de Transports Aenens*, No. 83-2291, slip op. at ___ (D.D.C. June 26, 1984) (a foreign court that lacks jurisdiction of underlying controversy has no valid basis

in transnational veil-piercing cases because, generally, the foreign corporation seeking to invoke the Convention does so as the national of a country that has adopted its provision to authorize that country's court to reject letters rogatory when to accept them would violate local discovery blocking statutes.¹⁷⁹ Thus, the foreign corporation argues that the Hague Convention binds the United States to submit its judicial discovery orders to courts of a country that must legally refuse to honor them. Rejecting applicability of the Convention, one federal court noted that the blocking statutes of a country can constitute a "serious disability," because it will force the American court to apply all necessary sanctions for protection of its own powers and jurisdiction.¹⁸⁰

Enterprise analysis probably already has its broadest application in traditional corporate veil-piercing enforcement and discovery proceedings. The enterprise theory is generally the rule rather than the exception in such instances and, as seen in *Marc Rich* and *Toyota*, courts will not have difficulty exercising jurisdiction over all the affiliates, foreign and domestic, engaged in conduct having adverse forum effects. Because exercise of jurisdiction in such circumstances is constitutionally permissible, decisions relying upon *Cannon* as support for rejection of such jurisdiction may not be sound. Finally, *forum non conveniens* dismissal is also present, although on grounds related to international comity rather than convenience.

C. Federal Antitrust Litigation

There are two categories of legal developments related to transnational corporate veil-piercing in federal antitrust litigation. In the first category are issues left unresolved by the *Copperweld* decision, which eliminated one source of contention in multinational veil-piercing antitrust litigation by abrogating the intra-enterprise conspiracy doctrine for a parent and its wholly owned subsidiary. After *Copperweld*, it is unclear whether two corporations, affiliated through some, but not total common ownership and direction, can unlawfully conspire with one another in violation of the Sherman Act.¹⁸¹ The

for displacing decision-making authority of the U.S. courts with regard to U.S. laws and effect of treaty on litigation); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983) (Hague Convention did not supersede the discovery provisions of the Federal Rules of Civil Procedure—existence of federal jurisdiction over a foreign entity subjects that entity, like any other litigant, to the provisions of the Federal Rules).

¹⁷⁹ See BLUMBERG, *supra* note 2, at 254-55.

¹⁸⁰ *Craco*, 101 F.R.D. at 527.

¹⁸¹ *Copperweld* left essentially intact previous antitrust decisions imposing liability upon the various affiliate corporations of a multinational enterprise. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), which involved an American corporate defendant that owned substantial numbers of shares in its French and British affiliates, also defendants. The Court found that these defendants committed federal antitrust violations by colluding with one another to allocate markets, fix each others' prices, and work to foreclose outside competitors in each others' markets. The Court based its finding on intra-

answer may depend upon traditional corporate veil-piercing analysis to determine whether the affiliated corporations acted independently and separately from one another, despite common ownership and direction. Thus, antitrust conspiracy liability in such instances could depend upon the extent to which one affiliate has "effective working control" over the other, or whether the two retain independence and arm's length distance from one another, a result that *Copperweld* implicitly seeks to avoid.¹⁸²

Also unclear after *Copperweld* is the extent to which "effective working control" or some higher economic integration among affiliated corporations can subject the entire enterprise to liability for the conduct of any one component. The *Copperweld* Court determined that a parent and its wholly owned subsidiary constitute one business enterprise with common goals and purposes. This classic enterprise analysis situation supports the view that the anticompetitive conduct of the subsidiary can subject its parent to antitrust liability merely on the basis of ownership.

There is no reasonable basis for concluding that a court cannot reach a similar result whenever it finds that one affiliate controls another through stock ownership and perhaps some common director and management personnel. Such a result would not be inconsistent with *Copperweld*, which supports the view that affiliated corporations may now be considered one economic and legal entity for antitrust liability purposes. Until the courts clarify this area, the issue promises to spawn extensive litigation, particularly in foreign commerce antitrust disputes involving domestic and foreign affiliates.

The second category of federal antitrust trends and developments in the multinational corporate veil-piercing area involves the few recent foreign commerce decisions that use enterprise analysis at the expense of entity theory. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*¹⁸³ the Supreme Court determined that private parties

enterprise liability even though the lower court concluded with extensive fact-finding that the three corporations had retained arm's length distances from one another. See *United States v. Timken Rollers Bearing Co.*, 83 F. Supp. 284, 311 (N.D. Ohio 1949). The *Timken* intra-enterprise liability conclusion is probably no longer valid because of *Copperweld*, but the more interesting issue is whether the lower court fact-finding could support liability under § 1 of the Sherman Act against these affiliates, which appeared as collaborating competitors rather than functionally dependent entities of a single enterprise even though they in fact acted as one. *Copperweld* noted that the gist of the antitrust violation in *Timken* may have been the common stock ownership and suggested that a different result might have been reached if the case were reheard. *Copperweld*, 104 S. Ct. at 2739 n.11.

¹⁸² See, e.g., ANTITRUST DIVISION, UNITED STATES DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977), Case A, reprinted in P. AREEDA, ANTITRUST ANALYSIS 1236, 1241-43 (3d ed. 1981), which uses an effective working control test in foreign commerce antitrust cases brought by the Department. For an illustration of how such a test might be judicially applied, see *Brager Co. v. Leumi Securities Corp.*, 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977).

¹⁸³ 370 U.S. 690 (1962). This decision conflicts with *Alcoa*, an earlier case in which the Canadian affiliate was found to be within the court's jurisdiction and subject to liability for

could attack the anticompetitive conduct of foreign affiliates of American-based multinational corporations through the parents. The case never reached final disposition, but the reported opinion left little doubt that Union Carbide could be found liable for its foreign affiliate's Canadian vanadium monopoly on the basis of anticompetitive effects in the United States.¹⁸⁴

This extraterritorial application of United States antitrust law strongly affects the potential legal liability of foreign parent corporations. In *Industrial Investment Development Corp. v. Mitsui Co.*,¹⁸⁵ for example, the Fifth Circuit's opinion potentially curtails the application of a limited liability rule to the foreign-based transnational enterprise with domestic affiliates whenever the foreign and domestic affiliates conspire with other defendants to commit an antitrust violation. *Mitsui* is probably consistent with *Copperweld*, because the former would attribute the acts of a parent and its subsidiary to one another whenever either conspires with other parties to commit acts that would benefit the enterprise as a whole.¹⁸⁶

In analyzing the corporate relationships within plaintiffs' and defendants' respective enterprises, *Mitsui* makes several significant observations. The court determined that even though only plaintiff's Hong Kong subsidiaries suffered direct harm by being excluded from Indonesia, it would nonetheless pierce the corporate veils of the plaintiff to permit parental recovery for harm to its subsidiaries abroad.¹⁸⁷ The court refused to rule on whether the Japanese corporation sufficiently restrained American foreign commerce to satisfy Sherman Act subject matter jurisdiction on the effects principle because there had been no finding on the merits.¹⁸⁸ If the trial court finds an affirmative answer to this issue on remand, it must decide whether the Sherman Act can realistically govern the conduct of foreign corporations abroad when they engage in American foreign

its participation in the global aluminum cartel. The *Continental Ore* court nonetheless refused to impute liability to the American parent. *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 392-99 (S.D.N.Y. 1950) (trial court opinion on remand).

¹⁸⁴ *Continental Ore Co.*, 370 U.S. at 710.

¹⁸⁵ 671 F.2d 876 (5th Cir. 1982), *vacated*, 103 S. Ct. 1244, *reaff'd*, 704 F.2d 785 (1983), *cert. denied*, 104 S. Ct. 393 (1984).

¹⁸⁶ Plaintiffs, an American parent and its two Hong Kong subsidiaries, sued a Japanese parent and its American subsidiary, as well as unaffiliated Indonesian business associations, for conspiring to keep plaintiffs out of the Indonesian tree harvesting and lumber exporting businesses. After protracted procedural battles lasting several years, in which the district court twice dismissed the case on various grounds only to be reversed each time on appeal, the Fifth Circuit reached several important legal conclusions. It determined that both the American plaintiff and the American defendant were in the lumber import business so that any competition for overseas supply sources sufficiently affected United States foreign commerce for antitrust purposes. *Mitsui*, the Japanese parent defendant, as an alleged co-conspirator with its domestic subsidiary, thus became subject to federal court jurisdiction. *Id.* at 877.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 883-84.

commerce through American subsidiaries. This characterizes almost every foreign parent corporation with domestic subsidiaries, and thus, these issues have extremely important future consequences.

Cascade Steel Rolling Mills, Inc. v. C. Itoh and Co. (America),¹⁸⁹ another foreign commerce antitrust case still unresolved on the merits, involved claims against various Japanese steel manufacturers and their American subsidiary corporations. Three of the Japanese defendants had no contact with the United States other than through wholly owned domestic subsidiaries. The court found, however, that the Japanese defendants were within its jurisdiction under *United States v. Scophony Corp.*,¹⁹⁰ which attributes a subsidiary's activities to its parent when the latter sufficiently controls and supervises them. The court also concluded that the foreign defendants could probably be sued on the basis of the American business transacted through their domestic subsidiaries, a ruling consistent with traditional antitrust principles.¹⁹¹

The *Cascade* court developed a test for determining when a foreign parent is susceptible to federal antitrust liability and jurisdiction on the basis of its subsidiary's American presence and activities. This test, which is identical to that used in the subsequent *Chrysler-General Motors* joint venture litigation,¹⁹² is based primarily upon parental control and supervision over subsidiary activities, regardless of whether the activities are the source of the litigation. While this test may be too restrictive in light of *Copperweld*, which arguably makes even the subsidiary's mere forum presence that of its parent, courts may not be ready to make "presence" and "transacting business" synonymous. If "presence" and "transacting business" are synonymous for antitrust personal jurisdiction purposes, a foreign parent may have an incentive to refrain from creating domestic subsidiaries that are likely to increase parental amenability to suit.

Even when personal jurisdiction exists over a foreign affiliate, antitrust subject matter jurisdiction requirements must be met by a finding of adverse impact upon American foreign commerce. In

¹⁸⁹ 499 F. Supp. 829 (D. Ore. 1980).

¹⁹⁰ 333 U.S. 795, 814 (1948).

¹⁹¹ Section 12 of the Clayton Act, 15 U.S.C. § 22 (1982), provides that federal antitrust suits may be brought wherever a corporation "transacts" business, and foreign corporations generally transact business in a forum with or through their forum affiliates, to the extent there are any.

¹⁹² The elements of the test include: (1) whether the parent and subsidiary have formed a partnership to compete on a worldwide basis; (2) whether the parent can influence the subsidiary in matters with antitrust consequences; (3) whether there is an integrated manufacturing, sales, and distribution system; and (4) whether the subsidiary is the parent's marketing arm, with common trademarks and advertising. *Cascade*, 499 F. Supp. at 838. See also *Zenith Radio Corp. v. Matsushita Elec. Indus.*, 402 F. Supp. 262, 327-28 (E.D. Pa. 1975) (court found these elements existing in most of the parent-subsidiary relationships).

Montreal Trading, Ltd. v. Amax, Inc.,¹⁹³ for example, the court dismissed a federal antitrust claim brought by a Canadian plaintiff against various American corporations that had allegedly conspired with their Canadian affiliates to boycott plaintiff's Canadian transactions, because of insufficient effects upon American foreign commerce. The court did not find that the corporate interrelationships among the American and Canadian affiliates constituted these effects. The decision suggests that enterprise analysis may not readily apply to anticompetitive conduct engaged in abroad by the foreign affiliates of American corporations.¹⁹⁴ In a more recent decision, *Eurim-Pharm v. Pfizer, Inc.*,¹⁹⁵ the court dismissed an antitrust suit against an American parent and several of its wholly owned foreign subsidiaries for alleged injuries to a German corporation abroad because there were no reasonably foreseeable adverse effects on either American import or export commerce.

To the extent that foreign commerce antitrust litigation involving transnational veil-piercing issues survives *Copperweld* and arises in the future, it probably will be analyzed in a manner identical to that of grand jury, tax enforcement, and discovery litigation.¹⁹⁶ Enterprise analysis could therefore supersede entity analysis without disrupting current legal precedent, particularly since *Copperweld* eliminates a basis for any deferential treatment otherwise owed to separate, but closely affiliated corporations. Although a court must have personal jurisdiction over the foreign corporate defendant, this is easily found under a transacting business standard whenever that defendant engages in forum business through or with a domestic affiliate. Enterprise analysis of foreign commerce antitrust disputes is thus compatible with current legal principles.

D. Federal Securities Litigation

Piercing the multinational corporate veil has been an issue in recent federal securities and commodities litigation, where courts

¹⁹³ 661 F.2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982).

¹⁹⁴ *Accord* Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa), 518 F. Supp. 270 (W.D. Pa. 1981). This is consistent with congressional intent in amending the Sherman Act. Cf. *Pfizer v. Gov't of India*, 434 U.S. 309 (1978) (determining that anticompetitive acts of American corporations by the nature of the actors' identity constituted sufficient adverse forum effects to support Sherman Act jurisdiction). Does a foreign subsidiary acting abroad at the instructions of its American parent subject the parent to American antitrust liability? Should it, when the foreign subsidiary is not violating the laws of its own country because there are none?

¹⁹⁵ 593 F. Supp. 1102 (S.D.N.Y. 1984).

¹⁹⁶ This is probably not surprising, for as Dean Blumberg observes, larger markets such as the United States are "committed to aggressive restraints on trade practices asserted extraterritorially," and therefore, "the corporate transnational complex is looked upon as a single undertaking or enterprise, [and] the formalities of corporate structure are ignored . . . without regard to the fact that some components may be located abroad." BLUMBERG, *supra* note 2, § 10.12, at 265.

have implicitly applied enterprise rather than limited liability principles. In *Doffmeyer v. W. F. Hall Printing Co.*¹⁹⁷ plaintiffs sued a Canadian bank and its Bahamian branch for the latter's conduct as a trustee voting certain shares of stock in a manner alleged to violate federal securities laws. The court ruled that the control-based liability statutes should be construed literally to impose liability upon the Canadian bank for the conduct of its branch, unless one of the specified defenses applied. It further held that "the exercise of control over the offending corporation is a sufficient contact upon which to predicate [personal] jurisdiction" in any federal securities litigation.¹⁹⁸

*Tamari v. Bache Co. (Lebanon) S.A.L.*¹⁹⁹ involved a dispute arising between foreign investors and the foreign affiliate of a domestic corporation over transactions originating abroad, which resulted in trading activities on the American commodities exchange. The court found subject matter jurisdiction under the Commodities Exchange Act²⁰⁰ because the foreign corporation had acted as agent for its American subsidiary in the solicitation, and the trading activities had occurred on the American exchange.²⁰¹ The *Tamari* court used an enterprise liability concept at the expense of the limited liability doctrine, and other courts confronted with similar facts have reached identical results.²⁰² Foreign corporations that solicit and transact investment activities with foreign investors abroad, for trading on American exchanges by their domestic affiliates, will usually subject themselves and their affiliates to liability under such a broad scheme, and separate corporate identities will be ignored.²⁰³

Not all courts have been as willing to pierce the corporate veil of foreign affiliates to reach their American parent for securities activities engaged in abroad. For instance, in *Fidenas A.G. v. Honeywell*,

¹⁹⁷ 558 F. Supp. 372 (D. Del. 1983).

¹⁹⁸ *Id.* at 386 (relying upon *Sun First Nat'l Bank of Orlando v. Miller*, 77 F.R.D. 430, 440 (S.D.N.Y. 1978)). Federal securities statutes impose joint and several liability for violations on the basis of corporate control except where the controlling person, incorporated or otherwise, has no knowledge or reasonable basis for knowing about the actionable conduct of the controlled person or entity, or else acts in good faith and does not induce the conduct. 15 U.S.C. § 78t (1982). *Cf.* 7 U.S.C. § 4, which bases control on agency. Federal antitrust statutes are silent on this point.

¹⁹⁹ 730 F.2d 1103 (7th Cir. 1984).

²⁰⁰ 7 U.S.C. §§ 1-26 (West Supp. 1984).

²⁰¹ *Tamari*, 730 F.2d at 1108.

²⁰² *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Creswell v. Prudential-Bache Securities, Inc.*, 580 F. Supp. 55 (S.D.N.Y. 1984).

²⁰³ One court reasoned that "[t]he way to encourage foreign traders to trade on the [domestic] . . . futures market rather than on foreign markets is to maintain a regulated market with standards of care imposed on [domestic] commission merchants." The court further stated that domestic traders should not be permitted to thwart such a goal "by utilizing affiliates based in foreign countries and avoiding the standard of care owed to its customers. Public policy dictates this conclusion." *Alpa S.A. Agrindustrial Alemano v. ACLI Int'l*, 573 F. Supp. 1070, 1076 (1983).

*Inc.*²⁰⁴ Honeywell and its various European subsidiaries became embroiled in various securities fraud cases for allegedly illegal conduct occurring in both the United States and Europe. Plaintiff sought to reach the European affiliates through their American parent in a United States court and also sought to impose liability on Honeywell for the acts of its subsidiaries in Switzerland. The court found that Honeywell neither controlled, nor dominated its European affiliates and refused to pierce the veil for liability purposes.²⁰⁵ The court also refused to pierce the veil for jurisdictional purposes, because there was little impact in the United States from the activities of the European defendants and few forum contacts.²⁰⁶ While a *forum non conveniens* dismissal would probably have been a more appropriate result, a relationship between foreign affiliates and an American parent characterized solely by stock ownership without forum impact should not subject either the parent or the courts to litigation.²⁰⁷

In federal securities and commodities litigation there is seldom any judicial attempt at the type of rigorous analysis applied in state unitary tax cases to determine whether the defendants are functionally integrated economic entities. This suggests that such analysis is unnecessary to support liability or jurisdiction on the basis of enterprise in these cases. The extent to which *Copperweld's* treatment of parent and subsidiary corporations as one economic unit will apply to securities and commodities cases is still to be addressed. *Copperweld* is consistent, however, with both the statutorily presumed liability on the basis of corporate control in securities cases and the statutorily presumed liability on the basis of agency in commodities cases.²⁰⁸ Once the requisite forum conduct has been established for subject matter jurisdiction, personal jurisdiction is generally presumed in transnational securities and commodities cases. *Marc Rich* clearly illustrates the propriety of such a result and is not inconsistent with *Hall's* prerequisite that a foreign defendant's forum contacts be either related to the litigation or ongoing in nature.²⁰⁹

²⁰⁴ 501 F. Supp. 1029 (S.D.N.Y. 1981). See also *Fidenas A.G. v. Compagnie Internationale Pour L'Informatique CIT Honeywell Bull S.A.*, 606 F.2d 5 (2d Cir. 1979) for related litigation.

²⁰⁵ 501 F. Supp. at 1037.

²⁰⁶ *Id.*

²⁰⁷ See, e.g., *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982). Cf. *Creswell*, 580 F. Supp. 55; *Alpa*, 573 F. Supp. 1070.

²⁰⁸ As a commercial matter, it is reasonable to assume that a corporation with the power to control a subsidiary will exercise it in all significant securities decisions or transactions; while the commodities brokerage industry is characterized by corporate affiliates serving as agents for one another in the world commodities markets. The *Marc Rich* litigation clearly illustrates this point, although the petroleum futures trading activity is not subject to federal commodities trading laws. 707 F.2d at 663.

²⁰⁹ Although the subject matter and personal jurisdiction issues in federal securities and commodities cases tend to become blurred, most courts will exercise both types of jurisdiction on the basis of the "effects" principle, as illustrated in *Marc Rich* and its forerunner, *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d

The securities and commodities *forum non conveniens* decisions, however, require somewhat closer analysis. These dismissals are virtually never granted when the American marketplace is used to effect any material part of a given transaction, even when the injury occurs abroad and the victims are foreign. There seems to be little justification for such a result when two conditions are met: if the actionable conduct is also illegal where the injury occurs abroad; and if the American corporation neither controls its foreign affiliate's activities, nor serves as its agent in the challenged transaction. There is no reason why United States courts should not grant *forum non conveniens* dismissals of such cases, because they would not conflict with the securities laws, which already permit good faith defenses by controlling party defendants, or the commodities statutes, which require an agency relationship to exist before liability may be imposed upon the domestic broker for the activity of its foreign affiliate.

E. Veil-Piercing Cases in Labor and Employment Law Litigation

While substantive liability and jurisdiction issues affecting the corporate components of a multinational corporate enterprise do not often arise in the workplace, except in employment discrimination suits, many companies, particularly those controlled by foreign parents, have little, if any, notion of the scope of their potential liability to their domestic subsidiary employees. Federal labor law has long recognized the "single enterprise" theory of bargaining agreement liability whenever the relationship between affiliated corporations is characterized by functional operational integration, centralized labor relations control, common management, and common ownership.²¹⁰ Furthermore, federal collective bargaining law has long recognized alter ego veil-piercing whenever a second corporation is created by the same ownership and management interests to avoid bargaining agreement obligations.²¹¹

Whether enterprise liability has ever been applied to two wholly owned subsidiaries of a common parent to impose bargaining agreement liability upon one subsidiary for the obligations of the other is not clear. Post-*Copperweld* decisions, however, support the principle that all wholly owned subsidiaries and their parents are a common business entity with identical legal and economic interests. *Cop-*

Cir. 1972). For an excellent summary of these issues, see Note, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Expanded Application of the Conduct Test*, 59 NOTRE DAME L. REV. 471 (1984).

²¹⁰ See, e.g., *American Bell Inc. v. Federation of Tel. Workers of Pa.*, 736 F.2d 879, 888 (3d Cir. 1984), for the most recent discussion of this principle, although the court seems to apply a stricter standard for imposing the rule than is required by other precedent. See also *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1122 (3d Cir. 1983).

²¹¹ *American Bell*, 736 F.2d at 889; *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 259 n.5 (1974).

perweld principles can readily apply to multinational company bargaining disputes.

Although enterprise analysis is both precedented and permissible in bargaining litigation, it is virtually mandated in federally regulated pension and retirement obligations litigation, subject to the Employee Retirement Income Security Act (ERISA).²¹² The key ERISA provision defines an "employer" liable for pension withdrawal obligations to include all corporate affiliates under "common control," and its central purpose is to make all solvent corporations within the commonly controlled enterprise jointly and severally liable for the pension obligations of any one of them, regardless of whether any are solvent.²¹³ ERISA statutes reflect congressional intent to replace a limited liability rule with one based upon enterprise liability, which emasculates the reason for separate affiliate incorporation when applied to economically regulated business activities.²¹⁴

Employment discrimination claims against multinational companies have increased in American courts during the past several years, generating various transnational veil-piercing issues. The most recent significant case, *Sumitomo Shoji America, Inc. v. Avagliano*,²¹⁵ resulted in a Supreme Court determination that wholly owned American subsidiaries of foreign parents are American corporations subject to federal civil rights laws that bar employment discrimination on the basis of race, religion, gender, or ethnic background, notwithstanding any contrary bilateral treaty provisions that apply to corporate citizens of the parent's sovereign state.²¹⁶ This decision

²¹² 29 U.S.C. §§ 1301-1309 (1982).

²¹³ *Id.* § 1301(b)(1). "Common control" in turn is based upon certain common stock ownership traits among the corporate affiliates. "Common control" signifies all corporate groups where a parent owns at least 80% of the outstanding stock, all groups where five or fewer common shareholders own at least 50% of the stock in each group member, and all groups involving combinations thereof. 29 C.F.R. § 2612 (1984). See *Pension Benefit Guaranty Corp. v. Anthony Co.*, 575 F. Supp. 1048, 1050-51 (N.D. Ill. 1982). ERISA withdrawal liability amounts can be calculated on the basis of an overall corporate group net worth, a scheme not unlike state unitary taxing principles. 29 U.S.C. § 1362(b).

²¹⁴ "[The] corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it These limitations, however, do not construct a federal statute regulating interstate commerce for the purpose of effectuating policies Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case." *Anthony*, 575 F. Supp. at 956-57 (quoting Senator Williams); *Pension Benefit Guaranty Corp. v. Anthony Co.*, 537 F. Supp. at 1053. See also *Pension Benefit Guaranty Corp. v. Quimet Corp.*, 711 F.2d 1085 (1st Cir.), *cert. denied*, 104 S. Ct. 393 (1983).

²¹⁵ 457 U.S. 176 (1982).

²¹⁶ The key issue was whether the American subsidiary could be a Japanese company granted certain employment privileges under the Friendship, Commerce and Navigation Treaty, Apr. 2, 1953, Japan-United States, art. VIII, 4 U.S.T. 2063, T.I.A.S. No. 2863, or whether the subsidiary was an American "employer" subject to the employment discrimination bans of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). By opting to treat the domestic subsidiary as a domestic "employer" under the state of incorporation theory, the Court expressly rejected application of a "control" test in favor of a rule based upon

implicitly rejects enterprise analysis by refusing to treat parent and subsidiary as one economic entity and ignores the economic characteristics of most foreign-based multinational companies, which continuously interchange key alien personnel.²¹⁷ Although the *Avagliano* Court left open the question whether a foreign parent may be liable for wrongful discrimination by its domestic subsidiary, there is ample authority to suggest that a parent and its subsidiary will be treated as the same employer for discrimination liability purposes when the parent exercises sufficient control over the subsidiary's hiring and promotion decisions and retains a high level of economic integration.²¹⁸

Although vigorously enforced in the American workplace, federal employment discrimination laws generally do not apply to American employer hiring and promotion activities abroad, even when the American parent closely controls its foreign affiliates.²¹⁹ This bias against the extraterritorial application of federal fair employment law is even stronger in the case of foreign affiliates of American parents.²²⁰ Ironically, foreign corporations not otherwise subject to American law may be made fully liable for employment discrimination by domestic subsidiaries merely on the basis of American corporate identity, while American corporations generally subject to American law have little, if any, legal responsibility for discriminatory treatment against their own citizens that occurs abroad. This is a clear example of form prevailing over substance of a multinational company.

Another area of increasing legal controversy is that related to parent corporation liability for workplace injuries caused to the em-

form over substance. 457 U.S. at 183-85, 185 n.11. See Note, *The Rights of a Foreign Corporation and Its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce and Navigation*, 17 GEO. WASH. J. INT'L LAW & ECON. 607 (1983).

²¹⁷ The extent to which a key employee may work for both the foreign parent and its domestic affiliate may be affected by pending litigation. *Speiss v. C. Itoh & Co. (America), Inc.*, 725 F.2d 970 (5th Cir. 1984). See *id.* at 971-72 for precedent that parallels *Avagliano*.

²¹⁸ *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984).

²¹⁹ 42 U.S.C. § 2000e-1 expressly exempts the employment of aliens outside the United States, while courts generally have ruled that age discrimination suits against American employers may not be brought by American citizens for employment practices abroad under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982), which incorporates the foreign employment exemption provisions of the Fair Labor Standards Act, 29 U.S.C. § 213(f) (1982). See *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). Although federal statutes prohibiting discrimination on the basis of gender, race, and religious employment practices do not contain foreign employment exemptions, courts have been reluctant to apply them extraterritorially because of a general policy against extraterritorial application of federal labor laws. *Cleary*, 728 F.2d at 609; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). *But see Bryant v. Int'l Schools Serv., Inc.*, 502 F. Supp. 472, 482 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

²²⁰ *Mas Marques v. Digital Equipment Corp.*, 637 F.2d 24 (1st Cir. 1980).

employee of a subsidiary. Generally, an employee may not sue the employer for such injury, because of state workers compensation provisions; nor may the employee sue the employer's corporate affiliate for workplace injury where the affiliate's acts are unrelated to the injury, because employer liability cannot be imputed to its affiliate in such circumstances.²²¹ Where a parent corporation has a direct relationship to the employee's injury, however, some courts will permit separate actions against the parent.²²² Other courts have held parent corporations liable for injuries to subsidiary employees caused by parental negligence on the theory that separate incorporation should burden as well as benefit the enterprise whenever the facts illustrate the breach of an independent duty by the nonemployer affiliate. Inconsistent decisions, however, are the result of judicial disagreement over the scope and definition of such duty.²²³

Proof of an alter ego relationship in such cases has likewise created some conflicting decisions. Close control and functional integration between affiliated corporations is supposed to make them one legal entity for liability purposes, but when strictly applied, this rule makes the combined entity an employer for workers compensation purposes even though the insurance may be limited to the subsidiary.²²⁴ Conversely, where both parent and subsidiary are insured by the same compensation policy, and an alter ego relationship exists, there is little basis for permitting a separate employee workplace injury claim against the parent.²²⁵ A better approach would be to require parental coverage on the workers compensation policy whenever the parent engages in more than a passive investor role regarding its affiliate's workplace activities, and limit recovery to workers compensation. This is consistent with an enterprise theory and would result in few, if any, injustices to the injured employee.

Enterprise analysis can apply to most, if not all, types of veil-piercing issues in cases arising from employment relations and employee injuries, although the *Avagliano* discrimination decision may require modification of the entity rule. Wherever a parent corpora-

²²¹ *Shields v. San Diego County*, 155 Cal.3d 103, 202 Cal. Rptr. 30, 35-36 (Cal. Ct. App. 1984). This principle has been used to bar recovery against holding company parents of employer subsidiaries. See *Mitchell v. Shell Oil Co.*, 579 F. Supp. 1326 (D. Mont. 1984).

²²² For example, courts have held that a subsidiary employee may bring a products liability action against the parent that manufactures the product causing the harm regardless of whether the parent exercises control over the workplace. *Gigax v. Ralston Purina Co.*, 136 Cal.3d 591, 186 Cal. Rptr. 395 (Cal. Ct. App. 1982).

²²³ Compare *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1974), cert. denied, 444 U.S. 836 (1980), with *Love v. Flour Mills of America*, 647 F.2d 1058 (10th Cir. 1981).

²²⁴ See *Gregory v. Garrett Corp.*, 578 F. Supp. 890 (S.D.N.Y. 1983) amending *Gregory v. Garrett Corp.*, 578 F. Supp. 871 (S.D.N.Y. 1983) (involving questions of fact with regard to whether subsidiary has an alter ego with regard to employment of flight crews and ownership of aircraft). Cf. *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983).

²²⁵ *Gulfstream Land & Development Corp. v. Wilkerson*, 420 So.2d 587 (Fla. 1982).

tion has final decision-making power over a bargaining agreement and key personnel and workplace decisions, there is little justification for refusal to impose liability across the board. An enterprise liability rule could eliminate inconsistent and often illogical results in employee personal injury suits against employer corporation affiliates.

F. Veil-Piercing Developments in Additional Federal Claims

Various other federal statutes support legal claims against the corporate components of a multinational company. These statutes encompass substantive areas as disparate as export controls and the overseas operations of American banks. In general, absent evidence of contrary congressional intent, these statutes and the power of the courts to enforce them apply extraterritorially to reach the conduct of a foreign affiliate of a domestic corporation. When to pierce the corporate veil in such cases is decided according to federal common law.²²⁶

Even when veil-piercing statutory authority appears to exist, however, courts may be reluctant to exercise it, as seen in *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*²²⁷ *Rose Hall* involved statutory construction of federal Edge Act provisions²²⁸ in regard to the liability of American banks for offshore activities of their foreign branches and subsidiaries. The decision illustrates preference for *Cannon* formalism principles over enterprise analysis. Among the numerous legal issues in the dispute was whether an American bank could be liable for the alleged fraudulent and other tortious conduct by its overseas subsidiary in a series of complex hotel investment transactions that were apparently subject to close parental scrutiny. Despite both the existence and exercise of control over the challenged activities, the court refused to impose a strict or enterprise liability standard on the parent, reasoning that "Congress implicitly recognized the attendant legal distinction between parent and

²²⁶ One of the more highly publicized transnational corporate veil-piercing disputes triggered by such statute involved U.S. Government efforts to block the overseas subsidiaries of Dresser Industries and other American-based multinational companies from providing key materials to the Soviet Natural gas pipeline project through extraterritorial application of the Export Administration Act of 1979. See Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983). The United States argued that it had the power to apply the Act to foreign affiliates of American corporations. This argument is likely to be accepted by American courts notwithstanding potential conflicts with cases such as *Avagliano*. One recent federal appellate court noted, however, that for federal regulatory statutes to be applied extraterritorially, clear evidence of congressional intent to do so is required. *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 496 (D.C. Cir. 1984) (refusing to apply Commodities Exchange Act to permit discovery of Brazilian trader).

²²⁷ 576 F. Supp. 107 (D. Del. 1983), *modifying* 566 F. Supp. 1558 (D. Del. 1983).

²²⁸ 12 U.S.C. §§ 2031-2034 (1982). The Act expressly provides that suits arising out of banking transactions by Edge Act overseas subsidiaries may subject the parent to liability when it controls the conduct of the former.

subsidiary."²²⁹

Rose Hall is troublesome because it leaves the issue of control to the jury, which invites the application of diverse standards to identical fact patterns in Edge Act overseas banking activities. This runs counter to the reason Congress required Edge Act disputes to be heard in federal courts—the desire to develop uniform national overseas banking standards.²³⁰ Furthermore, the decision raises potentially complex issues regarding personal jurisdiction and *forum non conveniens*. It is not altogether clear whether application of *Cannon* formalism principles permits the exercise of personal jurisdiction over the foreign bank subsidiary solely on the basis of its legal affiliation with a domestic affiliate, even though such jurisdiction is apparently mandated in the statute. Compulsory Edge Act jurisdiction also apparently forecloses *forum non conveniens* dismissals where either the plaintiff or defendant insists upon bringing suit in an American court, although *Rose Hall* did not seriously consider this issue. The case ignores Edge Act enterprise analysis principles and should probably not be applied to similar future disputes.

Virtually all federal regulatory schemes, including those designed to protect American foreign commerce and policy interests from legal abuse, require uniform legal standards for effective implementation and enforcement. Such uniformity requires broad application of enterprise analysis principles to transnational veil-piercing disputes, because following *Cannon's* separate corporate entity rules necessarily fosters reliance upon numerous equitable exceptions carved out to justify corporate veil-piercing. Personal jurisdiction issues in these cases pose difficult problems only when the courts rely upon separate corporate formality to deny jurisdiction over foreign affiliates of domestic corporations. Such reliance thwarts federal economic regulatory policy when invoked to keep foreign affiliates with significant forum ties out of American courts. Enterprise analysis is more appropriate for resolving this issue in federal regulatory disputes involving foreign and domestic affiliates of a multinational company.

V. Piercing the Corporate Veil Under the Foreign Sovereign Immunities Act

Congress passed the Foreign Sovereign Immunities Act

²²⁹ 576 F. Supp. at 165-66.

²³⁰ It also tends to contravene the principle that American banks are generally liable for the banking activities of their overseas branches, incorporated or otherwise, particularly when, as here, the overseas subsidiary was probably too insolvent to honor its judgment obligations. *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1983). But see Hirsch, *Supervising Multinational Banking Organizations: Responsibilities of the Home Country*, 3 J. COMP. CORP. L. & SEC. REG. 238 (1981).

(FSIA)²³¹ in 1976 to deal with one of the world's most powerful economic forces—the commercial enterprise owned by a foreign state. The FSIA has two purposes: “to facilitate the bringing of suits against foreign governments arising out of commercial activity in United States courts,”²³² and to “provide a uniform statutory procedure for establishing subject matter and personal jurisdiction over foreign sovereign entities.”²³³ Contemplating that foreign governments would engage in commercial transactions through state-owned corporations, Congress made appropriate provisions in the Act to deal with the legal consequences.²³⁴

The importance of the FSIA to cases involving transnational enterprise liability in United States courts should not be underestimated. Although little time has elapsed since its passage, several rules have emerged from the case law. For instance, when a foreign state chooses to incorporate a commercial entity in the United States, the Act does not apply to that entity's conduct.²³⁵ The extent to which a foreign state may take advantage of the more stringent FSIA jurisdiction provisions by incorporating a domestic corporate shell subsidiary for the purpose of manipulating it is unclear. Because the Act does not purport to affect the laws of substantive liability, the foreign state parent may subject itself to potential liability for such conduct while immunizing itself from the court's jurisdiction. The Act is silent on whether incorporation of a domestic subsidiary by a foreign state is sufficient to bring the foreign government parent

²³¹ 28 U.S.C. §§ 1330, 1602-1611 (1982).

²³² *Velidor v. L/P/G/ Benghazi*, 653 F.2d 812, 816-17 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

²³³ *Id.* The FSIA codifies the “restrictive” theory of sovereign immunity, limiting such immunity to public acts as opposed to private or commercial acts. Congress intended to “make it clear that immunity cannot be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.” *Texas Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (quoting *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) (statement of Charles N. Brower, Legal Adviser, Dep't. of State)).

²³⁴ 28 U.S.C. § 1603 (1982). Section 1603(a) defines “foreign state” to include political subdivisions and agencies or instrumentalities. Section 1603(b) defines “agency or instrumentality of a foreign state” to include any entity “which is a separate legal person, corporate or otherwise, and 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 political subdivision thereof,” and which is neither chartered nor incorporated under the laws of the United States or any third country. *Id.*

²³⁵ See *Norfolk & Western Ry. v. United States*, 639 F.2d 1096, 1098 (4th Cir. 1981), which analyzes the significance of a railroad merger involving an American corporation wholly owned by the Canadian Government: “When a subsidiary operates a railroad not in Canada but in the United States, the fact that a foreign sovereign owns the parent does not render the railroad operated in the United States any less subject to applicable rules and regulations pertaining to privately owned railroads.” Although *Norfolk* did not involve the FSIA, it reveals that the Act does not apply to activities of a domestic corporation owned by a foreign state. See also *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 271 (3d Cir. 1980).

into the court's FSIA jurisdiction.²³⁶

The act of state doctrine is implicated in foreign sovereign immunity. Application of this doctrine is well illustrated in the petroleum cartel cases, which provoked considerable controversy over whether an aggrieved plaintiff could sue and recover from foreign governments for engaging in cartelization with substantial economic impact in the United States. This controversy culminated in the Ninth Circuit decision, *International Association of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries (OPEC)*,²³⁷ which held that neither the member nations of the OPEC cartel nor the Organization itself could be sued in American courts for violating the Sherman Act.

The FSIA carefully defines "agency" and "instrumentality" to guide determination of when to pierce the corporate veil.²³⁸ This does not, however, end the court's inquiry into whether a court may impose liability upon a foreign state for the acts of its wholly owned commercial agencies or instrumentalities. The Supreme Court has recently addressed this issue in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.²³⁹ A bank, wholly owned by the Cuban government, sued Citibank to recover certain funds allegedly owed it from transactions engaged in during the Cuban revolution. Citibank counterclaimed against Banco to recover for losses suffered from Cuban nationalization of its assets, alleging that plaintiff Cuban bank was a mere government alter ego that could be liable for its owner's

²³⁶ The legislative history makes brief reference to the doctrine of corporate limited liability, in rather straightforward language of a section that bars execution against the property of one agency or instrumentality to satisfy a judgment against a different, unrelated agency or instrumentality. H.R. REP. NO. 1487, 94th Cong., 2d Sess. —, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6628-29, referring to FSIA section codified at 28 U.S.C. § 1610(b) (1982).

²³⁷ 649 F.2d 1354, 1358, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The Supreme Court first identified the act of state doctrine in *Underhill v. Hernandez*, 168 U.S. 250 (1897), observing that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of a government of another state done within its own territory." *Id.* at 252.

Courts and commentators alike have attempted to provide a workable definition of acts that trigger act of state dismissals. *Alfred A. Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *Hawk, Noerr-Pennington Abroad and Foreign Government Compulsion Defense*, 47 ANTITRUST L.J. 987, 995 (1979). Recent examples of such acts are seen in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983) (mineral concession award); *Mol, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984) (cancellation of wildlife export agreements); *Compania de Gas de Nuevo Laredo, S.A. v. Entex*, 686 F.2d 322 (5th Cir. 1982), cert. denied, 103 S. Ct. 1435 (1983) (government takeover of privately-owned energy company).

²³⁸ 28 U.S.C. § 1603(b) (1982). *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir. 1983), cert. denied, 104 S. Ct. 161 (1983).

²³⁹ 658 F.2d 913 (2d Cir. 1981), rev'd, 103 S. Ct. 2591 (1983).

wrongful conduct.²⁴⁰ The Court found that since the Cuban government would be the only true beneficiary of any successful recovery on the claim, a refusal to permit recovery on the counterclaim "would permit governments to avoid the requirements of international law simply by creating judicial entities whenever the need arises."²⁴¹

Citibank sets forth veil-piercing principles that apply in FSIA cases, at least in a counterclaim context, suggesting that the distinction between a foreign state and its commercial entities will be ignored when justice requires it.²⁴² The agency theory of piercing the corporate veil also plays a role in helping the courts determine when to exercise FSIA jurisdiction over the foreign state itself for the acts of its wholly owned companies.²⁴³ Before a court may exercise FSIA jurisdiction, however, the challenged conduct must have sufficient effects within the United States.²⁴⁴

Other problems with the veil-piercing aspects of FSIA litigation are illustrated in a group of recent contract, tort, and business interference actions against the Government of Ireland and various state-owned entities. The courts had difficulty determining when and whether to exercise FSIA subject matter and personal jurisdiction over the various Irish government defendants for each others' conduct and presence.²⁴⁵

It is perhaps ironic that parental control over a subsidiary normally suggests the likelihood that a court will pierce the subsidiary's veil to reach the parent for redress of a legal wrong. In FSIA cases, however, such control is often presumed and may be irrelevant to piercing the foreign state corporation's veil to reach the state. The most troublesome aspect of this result is that foreign states can use the corporate structure to engage in conduct that would be barred to

²⁴⁰ Although 28 U.S.C. § 1607(c) (1982) provides for offsetting counterclaims, the lower court refused to permit counterclaim recovery against the Cuban Government because it found no legal nexus between the claim, the counterclaim, and the nominal parties, concluding that to hold otherwise would violate the FSIA intention "to cause the courts willy-nilly to pierce the corporate veils of foreign [sovereign-owned] entities." *Banco*, 658 F.2d at 919, 103 S. Ct. at 2581.

²⁴¹ *Banco*, 103 S. Ct. at 2603.

²⁴² See *Letelier v. Republic of Chile*, 575 F. Supp. 1217; *Letelier v. Republic of Chile*, 567 F. Supp. 1490 (S.D.N.Y. 1983), *rev'd*, No. 83-9048 (2d Cir. 1984). See also *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980); *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

²⁴³ See *Texas Trading*, 647 F.2d at 314; *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981).

²⁴⁴ See *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).

²⁴⁵ *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (court focused on defendants' limited activity in United States, rather than their extensive activity with plaintiffs in Ireland); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), *aff'd in part and rev'd in part* 517 F. Supp. 477 (D.D.C. 1981) (although plaintiff brought suit for conversion of equipment, expertise, and patent rights in Ireland, court concentrated on defendant's activity traced to United States).

the private enterprise, leaving aggrieved parties without suitable redress in many cases. Courts began piercing the corporate veil to avoid such results, and Congress passed the FSIA to enable aggrieved parties to seek legal redress, not to prevent them from doing so. The alternatives are applying enterprise analysis to FSIA problems or applying potentially conflicting "interests of justice" exceptions. Use of enterprise analysis is preferable, with the caveat that where the foreign agency or instrumentality consents to suit, the foreign state probably should not be made a party in the interests of sound policy. Finally, *forum non conveniens* should not be overlooked when the injury occurs abroad, and there is a more suitable alternative forum.

VI. Conclusion

Current frameworks for resolution of issues of transnational veil-piercing are inadequate to provide consistent judicial decisions and uniform legal standards. Such results are unacceptable in foreign commerce, which depends upon uniform rules and practices. Applying an enterprise analysis to resolve transnational veil-piercing liability and jurisdiction disputes may help bring about consistent results in the growing body of veil-piercing law.

Courts that apply enterprise analysis to transnational veil-piercing issues, particularly in the jurisdiction areas, reach virtually uniform results. Courts will exercise jurisdiction over the foreign affiliates of domestic corporations when the affiliates conduct business together in a forum, even when such business consists of merely the exercise of prudent shareholding functions by the parent. This result is supported by *Copperweld's* conclusion that parent corporations and their wholly owned subsidiaries have identical commercial and legal interests and, therefore, should not be treated as legally separate entities.

Decisions to pierce the corporate veil are generally made for proper reasons—to avoid fraud, injustice, or circumvention of an important regulatory policy. These reasons tend to lose meaning, however, when courts apply and define them differently in identical fact situations, as is frequent in veil-piercing litigation. An enterprise framework will help to develop a more consistent body of law based upon economic reality and should result in more effective legal risk assessment by multinational enterprises.