Jurisdiction Over Foreign States for Acts of Their Instrumentalities: A Model for Attributing Liability

Congress enacted the Foreign Sovereign Immunities Act[1] in an effort to set forth the "sole and exclusive standards" for foreign sovereign immunity[2] in United States courts.[3] The FSIA nevertheless fails to resolve the issue of when parties in United States courts may sue foreign states for the acts of nominally separate government instrumentalities.[4] These instrumentalities—government trading corporations, banks, and other commercial enterprises—may be judgment proof, yet they and the foreign state that owns or finances them may escape liability for commercial activity[5] that harms American parties.[6] This Note addresses the problems that

1. 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)) [hereinafter referred to as FSIA]. The FSIA went into effect on January 19, 1977.

2. For most of the United States' history, foreign nations enjoyed absolute immunity from the judicial process of the United States. Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 147 (1812) (granting immunity to warship of France within boundaries of United States); Berizzi Bros. Co. v. The Steamship Pesaro, 271 U.S. 562, 574 (1926) (sovereign immunity principles applied alike to warships and to government-owned merchant vessels). As states assumed a greater role in commercial trade, however, the absolute immunity of foreign nations was challenged. The decision to recognize or to disregard the state's immunity came to rest with the State Department, which sometimes made a formal suggestion to the courts regarding immunity. This suggestion bound the courts after *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) (suit dismissed because of State Department determination of immunity); *cf.* Republic of Mexico v. Hoffman, 324 U.S. 30, 38 (1945) (denying immunity after State Department took no position with respect to asserted immunity of vessel). In 1952, the State Department adopted the restrictive theory of immunity, which limits immunity to public, as opposed to commercial, acts of the sovereign. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984–85 (1952). The State Department's position remained dispositive until 1977, when the FSIA's delegation of decisionmaking authority to courts took effect.

3. H.R. REP. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6610 [hereinafter cited as HOUSE REPORT] (FSIA sets forth "sole and exclusive standards" for foreign sovereign immunity).

4. 28 U.S.C. § 1605(a)(2) (1982); *see also* Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 386 (1982) (guidance provided by FSIA for immunity determinations not clear).

5. *See* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity* (pt. 2), 85 COM. L.J. 228 (1980); Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440 (1983); Comment, *Establishing Jurisdiction Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act of 1976*, 19 HOUS. L. REV. 1003 (1982); Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980).

6. A foreign public entity may claim sovereign immunity only if it qualifies as a foreign state, 28 U.S.C. § 1603(a)-(b) (1982), and only if the act giving rise to the suit is outside of specified exceptions to sovereign immunity. 28 U.S.C. § 1605(a) (1982). The FSIA codified this restrictive theory of immunity.

arise when a domestic party attempts to attribute the acts of a foreign state instrumentality to the foreign state itself for the purpose of establishing the court's jurisdiction over the claim.

This attribution process challenges the judiciary to determine jurisdiction under difficult circumstances. Before deciding the jurisdictional issue, a court requires knowledge about the relations between the government and the instrumentality. Yet the court must conduct this fact-bound inquiry with due regard for the rights of foreign states. Given factual uncertainty and the need to resolve it in a way sensitive to foreign sovereigns, a court must carefully allocate the burdens of pleading and proof. It must formulate the legal tests that impose and shift those burdens to vindicate the rights of the domestic party while protecting the foreign state's rights to qualified immunity and due process of law.

A court that would exercise jurisdiction over a foreign state must also meet its institutional responsibilities to the coordinate branches. The judiciary must construe the FSIA in accordance with Congress' intent, and avoid provoking the foreign state to threaten United States foreign policy interests that the executive branch is charged with protecting.

This Note proposes a structural solution that mediates the conflict between a plaintiff's equitable claims for relief and a foreign state's right to avoid liability for activities to which it is only tenuously connected. Part I establishes that the FSIA is silent as to when a foreign state should be sued for indirect involvement in the wrongdoing of a nominally separate entity. Part II argues that the judiciary should resolve this issue. Unchecked judicial discretion, however, might damage United States foreign policy interests. Accordingly, Part III proposes legal tests of instrumentality-government relations to control the exercise of jurisdiction over the government. Part IV concludes that, even if statutory and constitutional requirements permit the action to go forward, the court should still examine whether maintaining comity among nations requires abstention from jurisdiction.

I. The Ambiguity of the FSIA

The Foreign Sovereign Immunities Act limits the extent to which foreign public entities may invoke sovereign immunity as a defense to claims raised against them in United States courts.[7] Under the FSIA, a domestic

7. Under the FSIA, state and federal courts have concurrent jurisdiction and must apply the same rules of foreign sovereign immunity. 28 U.S.C. §§ 1604–1605, 1607 (1982). The statute also provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (1982). In addition, foreign states may remove to federal courts any civil actions commenced against them in state courts. *Id.* § 1441(d).

party is generally allowed to sue foreign states for their commercial activities. The FSIA did not foreclose the possibility that foreign states could be sued for the acts of a nominally separate entity.[8] The Supreme Court similarly has left the issue unresolved. Nor do the due process clauses of the Fifth and Fourteenth Amendments of the Constitution foreclose such suits. The fairness concerns embodied in due process analysis, however, do disclose the need for principles and procedures that prevent excessive assertions of jurisdiction.

A. *The Statutory Framework*

With the FSIA, Congress attempted to provide federal and state courts with a comprehensive[9] framework to resolve all issues of foreign sovereign immunity.[10] The FSIA recognizes a general rule of immunity for a foreign state acting under its own name or through an instrumentality or government-owned entity.[11] If it qualifies as a "foreign state," it is presumptively immune unless the plaintiff can show that immunity is unavailable because the defendant's act falls under one of the expressly recognized exceptions to foreign sovereign immunity. These subject matter exceptions cover commercial activities having a nexus to the United States, waivers of immunity, expropriation claims, and most non-commercial tort claims.[12] Under the FSIA, a plaintiff's failure to fit the action against the state into one of these subject matter exceptions to immunity is a jurisdictional defect and bars suit.[13] This scheme, however, has two important shortcomings.

First, the foreign state may attempt to shield itself by acting through a corporate instrumentality. States with private or mixed economies, as well as states with centralized economies,[14] commonly use corporations and

8. *See infra* note 23.

9. *See supra* note 3.

10. The general purposes of the FSIA are (1) to codify the restrictive principle of sovereign immunity of states; (2) to remove decisions on sovereign immunity from the executive branch and give them to the judiciary, thereby reducing the foreign policy implications of immunity determinations; (3) to provide a method of service of process for foreign state defendants; and (4) to establish a method of satisfying judgments against foreign states. HOUSE REPORT, *supra* note 3, at 7-8.

11. 28 U.S.C. § 1603(b) (1982).

12. 28 U.S.C. §§ 1605(a)(1), (2), (3), (5) (1982). Congress also denied immunity for claims involving gifts and succession or immovable property situated in the United States. 28 U.S.C. § 1605(a)(4) (1982).

13. Failure to fit the foreign state into one of the subject matter exceptions to immunity defeats subject matter jurisdiction under 28 U.S.C. § 1330(a) (1982). Since personal jurisdiction equals subject matter jurisdiction plus service of process, the failure also defeats personal jurisdiction under 28 U.S.C. § 1330(b) (1982).

14. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591, 2598-99 (1983). In Western European countries, the state-owned sector of the economy is expanding and beginning to dominate in many vital industries, from electronics and computers to oil, steel and transportation. *See* Heilbroner, *The Coming Invasion*, N.Y. REV. OF BOOKS, Dec. 8, 1983, at 23, col. 1.

other legal entities to conduct a variety of trading, banking, and investing activities.[15] These activities can harm American parties, yet a potential plaintiff may be unable to obtain redress[16] or even a hearing by suing only the instrumentality. By the time the case reaches judgment, the foreign state may have dissolved the instrumentality without appointing a successor entity.[17] Alternatively, the instrumentality may be insolvent, or have no assets in the United States.

In these situations, the plaintiff's only source of redress is the foreign state itself. To sue the state, the plaintiff must connect the state with the damage caused by the instrumentality. Of course, a state that merely owns an independently operating entity is not liable[18] for the acts of that entity.[19] Yet it may sometimes be equitable to permit the plaintiff to sue the foreign state. The conduct of the foreign state and the pattern of foreign state-foreign entity relations may properly subject the foreign state to the jurisdiction of United States courts.

Second, the FSIA simply overlooks the case in which an American defendant, sued by a foreign instrumentality, holds a legally cognizable claim against the instrumentality's parent state for a different cause of action. The FSIA appears to allow a state to invoke sovereign immunity to avoid the suit of an American party even while its instrumentality avails itself of the court's authority against that same party.

These concerns suggest that courts should in some cases assert equitable jurisdiction over the foreign state for acts of its instrumentality. When a

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15. HOUSE REPORT, *supra* note 3, at 15–16 (examples of agencies or instrumentalities of a foreign state include state trading corporation, mining enterprise, transport organization, central bank, and export association).

16. A primary purpose of the FSIA is to protect the rights both of foreign states and of litigants in United States courts. 28 U.S.C. § 1602 (1982).

17. The plaintiff will be entitled to obtain redress from any successor that takes over the assets and liabilities of the state entity, if the successor has assets. The initial defendant's contacts with the United States should be attributed to its legal successor. In such instances, the inquiry into jurisdiction becomes a matter of tracing the succession of the liability from one foreign state entity to another. For example, when Indonesia liquidated PN Pertamina, its national petroleum company, it created a new corporation, Pertamina, which succeeded to all the rights, obligations, assets, and liabilities of the liquidated company. *See* Fabrikant, *Pertamina: A National Oil Company in a Developing Country*, in INTERNATIONAL LEGAL CENTER, LAW AND PUBLIC ENTERPRISE IN ASIA 192, 206–07 (1976).

18. International comity requires courts of one state to recognize the legislative, executive, or judicial acts of another nation, with due regard both for international duty and convenience and for rights of its citizens or other persons who are under the protection of its laws. *See* Hilton v. Guyot, 159 U.S. 113, 164, 205–06 (1895) (in action in U.S. court by foreign citizen to enforce foreign judgment against American citizen, judgment is conclusive on the merits unless some special ground such as fraud, prejudice or violation of international law is shown).

19. The government's normal non-liability results from the separate status of a government instrumentality, rather than from sovereign immunity *per se*. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. at 2600 (presumption of separate status of government instrumentalities safeguards efforts of sovereign nations to structure their governmental activities in manner deemed necessary to promote economic development and efficient administration).

court should do so will depend upon the specific constraints imposed by congressional intent, the decisions of the Supreme Court, and the due process clauses of the Constitution.[20]

B. *Congressional Intent*

The FSIA is the exclusive statute governing jurisdiction over all foreign public entities.[21] On its face, the FSIA neither directs nor forbids a court to exercise jurisdiction on equitable grounds over indirectly involved foreign states. If the statute, by its silence, barred the equitable exercise of jurisdiction, the inquiry would be at an end.[22] The language of the FSIA is ambiguous, however, about the requisite connection between a foreign state and an act giving rise to subject matter jurisdiction.

Moreover, the legislative history expressly leaves open the possibility of piercing the veil between an instrumentality and its parent state. Congress did not intend the statute to affect the attribution of responsibility among entities of a foreign state, or to resolve the issue of whether the proper entity has been sued.[23] Congress thus chose in the FSIA to leave open the possibility of equitable suits, but left the development of the area to federal common law.[24]

C. *Federal Common Law and International Law*

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*,[25] the Supreme Court implicitly acknowledged that, given

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20. U.S. CONST. amends. V, XIV.

21. *See supra* notes 3 and 7.

22. The FSIA is an exercise of Congress' undisputed power under article III, § 2 of the Constitution to decide whether and under what circumstances foreign nations should be subject to suit in the United States. *See* Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1971 (1983) (congressional authority over foreign commerce and foreign relations confers this undisputed power on Congress).

23. HOUSE REPORT, *supra* note 3, at 12 (FSIA not intended to affect attribution of responsibility among entities). *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. at 2597 (FSIA does not prohibit holding foreign instrumentality owned and controlled by foreign government responsible for actions taken by that government).

24. Peter Westen and Jeffrey Lehman have argued that in areas calling for uniform federal regulation, the federal courts are authorized, either by Congress' silence or by the article III power to make law when Congress is silent, to fashion federal common law subject to legislative oversight. This lawmaking may also consistently be viewed as an interpretation of the statute in question. *See* Westen & Lehman, *Is There Life for* Erie *after the Death of Diversity?*, 78 MICH. L. REV. 311, 332-33 (1980); Westen, *After "Life for* Erie"—*A Reply*, 78 MICH. L. REV. 971, 983, 986 (1980). Westen concludes that "[t]he important thing is to know . . . when Congress has been silent, and . . . whether an area calls for uniform federal regulation." *Id.* at 984 n.49. The subject discussed here qualifies on both grounds. Federal court exercise of its common law prerogative is appropriate because of the need for uniformity to simplify dealings with foreign nations. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 116 n.7 (1978).

25. 103 S. Ct. 2591 (1983). The background of the case is set forth in Note, *The Separate Entity Fiction Exposed: Disregarding Self-Serving Recitals of Juridical Autonomy in Nationalization Cases*, 6 FORDHAM INT'L L.J. 288 (1983).

Congress' silence, piercing the corporate veil of a foreign state is permissible under some circumstances. Bancec was the Cuban government's autonomous credit institution for foreign trade. Bancec brought suit in federal district court to collect on a letter of credit issued by an American bank. The Cuban government had previously seized and nationalized the American bank's Cuban assets. The American bank counterclaimed against Cuba, asserting a right to set off the value of its seized Cuban assets against its debt to Bancec. The bank argued that the Court should pierce the corporate veil between Bancec and the Cuban government.

The Supreme Court held that principles of equity in federal and international common law[26] would be offended if Cuba could escape liability for an act violating international law while Bancec, whose assets and liabilities were divided between the Cuban central bank and foreign trade ministry, could invoke the jurisdiction of a United States court to press its claims.[27] The reasoning the Court employed in *Bancec* to justify its decision to disregard a corporate form is valid for claims in a complaint as well as a counterclaim. The Court failed, however, to delineate precisely the circumstances that would justify disregard of the normal juridical separation between an instrumentality and its parent state.[28] Like Congress, the Court has left the area open to common law development.

D. *Due Process Issues*

The state's defense to an assertion of jurisdiction is, in the first instance, a claim of mistaken identity. The state's advocate points to the juridical separation between the state and the instrumentality to demand that the state be insulated from suit. The Supreme Court indicated in *Bancec* that there is an initial presumption in favor of juridical separateness.[29] Before this presumption is set aside, the defendant foreign state has a due process right to a showing that it has a connection to those acts of the instrumentality that established the court's subject matter jurisdiction.[30] Due process concerns of "fair play and substantial justice"[31] thus limit the exercise of

26. International common law is the body of law formed by interpretation of international legal rules. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), (c), 59 Stat. 1055, 1060, T.S. No. 993.

27. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. at 2603.

28. *Id.* (announcing "no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded") (footnote omitted).

29. *Id.* at 2600 (1983).

30. The nexus may come from the state's actions in the forum or from its principal-agent relationship with the instrumentality. *See* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-07 (D.C. Cir. 1982) (subject matter exceptions to immunity impose limits on when a foreign state may be deemed to have "carried on" activities actually performed by another), *cert. denied*, 104 S. Ct. 71 (1983).

31. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

jurisdiction over foreign public entities as well as other potential defendants to a lawsuit.

As the Supreme Court held in *International Shoe Co. v. Washington*,[32] due process requires that a court assert jurisdiction only when the defendant has sufficient contacts within the court's territorial jurisdiction. In creating the commercial activity exception to immunity in the FSIA, Congress recognized this requirement of territorial contacts.[33] Once the court has obtained subject matter jurisdiction, that authority is transformed into personal jurisdiction through service of process.[34] As long as the defendant is the "foreign state" actor that engaged in the conduct giving rise to the suit, the requirement of territorial contacts automatically takes into account the due process rights of the defendant state.[35] But where the defendant foreign state and the instrumentality appear to be juridically separate, due process involves two hurdles. The instrumentality's action must properly subject the instrumentality to the jurisdiction of the court.[36] Additional justification is needed to exercise jurisdiction over the parent state consistent with due process.

Yet the FSIA does not adequately guide courts in deciding how to safeguard the foreign state's due process rights in this situation. Due process

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32. 326 U.S. 310 (1945).

33. HOUSE REPORT, *supra* note 3, at 13-14 (FSIA, 28 U.S.C. § 1330(b), embodies requirements of minimum jurisdictional contacts and adequate notice discussed in International Shoe Co. v. Washington, 326 U.S. 310 (1945)); East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387 (S.D.N.Y.) (to find personal jurisdiction over defendant foreign corporation, court must be satisfied that due process requirements incorporated in itemization of non-immune transactions in FSIA have been met), *aff'd*, 610 F.2d 806 (2d Cir. 1979); Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) (per curiam) (FSIA requires minimum contacts such that maintenance of suit does not offend traditional notions of fair play and substantial justice). Congress has specified that the *International Shoe* restrictions on state court jurisdiction also apply to federal jurisdiction over foreign sovereigns. Yet the Fifth Amendment, not the Fourteenth, governs the actions of federal courts. Moreover, the legislative history, by itself, is not sufficiently authoritative to introduce either the Fifth or the Fourteenth Amendment standard of due process into 28 U.S.C. § 1330(b) (1982). Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 n.36 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). It is likely that the minimum contacts analysis of *International Shoe* in the legislative history is a recognition that any exercise of personal jurisdiction is subject to the constitutional limitations of due process.

34. 28 U.S.C. § 1330(b) (1982).

35. The Court of Appeals for the Second Circuit has held that a "foreign state" is a person within the meaning of the due process clause. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The Third, Ninth and Seventh Circuit Courts of Appeals appear to have assumed this conclusion. *See* Velidor v. L/P/G Benghazi, 653 F.2d 812, 819 n.12 (3rd Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980); Purdy Co. v. Argentina, 333 F.2d 95, 98 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). The Supreme Court has not ruled on this question.

36. Since the state is being made to answer in place of the instrumentality, it must first be shown that the instrumentality has to answer at all. For example, in Gilson v. Republic of Ireland, 517 F. Supp. 477 (D.D.C. 1981), *aff'd in part and rev'd in part*, 682 F.2d 1022 (D.C. Cir. 1982), the finding of jurisdiction over the instrumentalities of the Republic would constitute the prerequisite for any effort to obtain jurisdiction over the foreign state under an equitable theory.

requires that a court assert jurisdiction only when the defendant has sufficient contacts within the court's territorial jurisdiction such that notions of "fair play and substantial justice"[37] would not be offended. In deciding whether to subject a foreign state to suit for the acts of its instrumentality, then, the court must turn to a relevant body of principles of fairness and justice. When the defendant is a foreign state, internationally recognized equitable principles should guide this determination. Yet the use of equity invites broad discretion.

II. Restraining Equity

The ambiguity of the FSIA, the undeveloped nature of federal common law, and uncertainty about the application of equitable principles raise the danger that decisionmakers will invoke equity in ways difficult to predict or regularize. Erratic decisionmaking poses particular dangers in the sensitive area of foreign relations.

To avoid these dangers, either a political or a judicial solution is conceivable.[38] The political branches could determine in each case whether the formally separate parent government may be sued for the acts of its instrumentality. The benefits of executive or legislative determination, however, are either illusory or attainable through a judicial approach that draws on the institutional strengths of courts.

A. *Political Branch Determination*

Deferring in this area to the executive branch has a superficial appeal. The President, or the State Department acting as the President's delegate, is arguably in the best position both to judge the consequences for the United States' foreign relations of a decision to pierce a foreign state's corporate veil, and to minimize the adverse consequences of such a decision. But placing in the executive branch the determination of any issue affecting a foreign state's amenability to suit contradicts the clear intent of Congress. In the FSIA, Congress unequivocally indicated its preference for allowing the judiciary to decide all questions of jurisdiction.[39] Congress believed that the difficulties of determining immunity within a political context outweighed any conceivable advantage in flexibility or bar-

37. 326 U.S. 310, 320 (1945).

38. Ultimately, of course, the issue of whether due process has been denied in a particular proceeding is a constitutional issue for the courts to resolve. Within the constitutionally permissible bounds of jurisdiction, however, the political branches conceivably could make or substantially direct the individual decisions.

39. 28 U.S.C. § 1602 (1982); House Report, *supra* note 3, at 14 (central premise of bill is that decisions on claims by foreign states to immunity are best made by judiciary on basis of statutory scheme that incorporates standards recognized under international law).

gaining power that executive determination of immunity issues would secure.[40]

Ironically, by denying to the executive branch any authority to decide sovereign immunity, Congress may have enlarged the President's foreign policy freedom.[41] By placing decisionmaking authority in a branch of government over which the Executive has no direct control, Congress freed the Executive from responsibility for determining questions of immunity, and for any adverse reaction to the courts' decisions.[42] Foreign states therefore cannot press the Executive for a dispositive determination of immunity, nor lay blame for an adverse decision with the Executive. The Executive accordingly has more freedom to pursue foreign policy objectives.[43]

Moreover, a judicial approach may preserve the advantages of resting the primary determination of immunity with the Executive. The court may invite the United States government to submit amicus briefs that provide information not otherwise available to the court, yet essential for determining whether to recognize sovereign immunity. Early involvement of the Executive in the suit as amicus will also enable it to plan policy to minimize any adverse consequences of a court decision against the foreign state.[44]

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40. In determining immunity, the State Department was in the awkward position of trying to apply a legal standard to litigation already before the courts. It also lacked the procedural machinery to take evidence, hear witnesses, or allow appeals. HOUSE REPORT, *supra* note 3, at 8.

41. The State Department can authoritatively inform a foreign state seeking to avoid liability for acts of one of its instrumentalities that it can expect no aid as a matter of right from the political branches. *Cf. Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315*, 94th Cong., 2d Sess. 34 (1976) (hereinafter cited as 1976 Hearings) (statement of Monroe Leigh, Legal Adviser to the State Department) (no advantages to allowing State Department to make political determination of foreign state's immunity in court; disadvantage of such power to enter political judgment would be that Department becomes involved in many cases where its officials would rather not do anything at all but face enormous pressure from foreign government to do something).

42. This argument presupposes that foreign governments understand and make allowances for the doctrine of separation of powers. Such an assumption is not unique to this context. In making treaties with the President, for example, foreign governments must take into account the fact that the President's action is subject to the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2.

43. For an example of the State Department's dispositive determination of immunity, see Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961) (per curiam) (State Department's certification of immunity for ship belonging to government of Cuba accepted by court without further inquiry). This certification of immunity was necessary to avoid further disturbance in relations between the United States and Cuba: *See* A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 109, 147 (1968).

44. For example, the United States Department of Justice advised a federal district judge that failure to set aside a default judgment against the government of China for the value of bearer bonds issued by the Imperial Chinese government in 1911, Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982), would exacerbate international tensions and could be expected to harm bilateral relations with China. N.Y. Times, Nov. 29, 1983, at D2, col. 1. The judge later set aside the default judgment and ruled that he would accept evidence from both parties on China's motion to dismiss. Wall St. J., Feb. 29, 1984, at 32, col. 5. The court, while responding to the U.S. govern-

Another political solution, legislation requiring courts to set aside corporate separateness in certain categories of cases, seems attractive because it offers uniformity and efficient disposition. But it prevents courts from tailoring their responses to unanticipated situations. In addition, fixed rules themselves will not eliminate, and may exacerbate, the difficulty of determining whether they are applicable in a given instance. Of course, once precedent and experience with the types of difficulties likely to arise have accumulated, Congress would be in a better position to codify judicially developed rules. Premature codification, however, would run counter to the FSIA's broad mandate of discretion to the courts.[45]

B. *The Judicial Approach*

Vesting the authority to decide whether to pierce the veil between a foreign state and its instrumentality in the judiciary is consistent with the FSIA's requirement that courts determine all issues of foreign sovereign immunity. Moreover, the courts offer a particular institutional competence well-suited to this type of decision, which demands factual investigation, equitable judgment, and strict attention to the due process rights of the potential foreign state defendant. Courts, then, rather than the political branches, should make these equitable decisions.

The two existing relevant bodies of law, however, are inadequate to guide courts in deciding jurisdiction over foreign states for acts of their instrumentalities.[46] First, the law of jurisdiction over foreign corporations for acts of their subsidiaries is designed for purely domestic circumstances, and overlooks the potential foreign policy harm of piercing a veil created by a foreign sovereign. Domestic law permits veil-piercing in situations likely to offend foreign states.[47] Second, the existing substantive law of

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ment's advice on the foreign relations impact of a default judgment, retained its jurisdiction over the dispute. The court later dismissed the bondholders' claims, ruling that the FSIA does not apply to transactions that took place before the statute was enacted. N.Y. Times, Oct. 27, 1984, at 38, col. 4.

45. *See* 1976 Hearings, *supra* note 41, at 53 (statement of Monroe Leigh, Legal Adviser to the State Department) (FSIA recognizes legislative inability to delineate commercial-governmental distinction and leaves issue to courts, with very modest guidance, to work out on case by case basis).

46. One might argue that the FSIA requires that state law determine whether the foreign state's corporate veil should be set aside. 28 U.S.C. § 1606 (1982) holds a foreign state "liable in the same manner and to the same extent as a private individual under like circumstances." But this standard of liability only applies "to any claim for relief with respect to which a foreign state is not entitled to immunity." Only after the foreign state is denied immunity does § 1606 specify the substantive standards by which the foreign state's acts are to be judged. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. at 2597–98 n.11 (distinguishing non-state-law question of attributing liability among entities of foreign state from application of state liability standards once proper defendant foreign state entity has been identified). These substantive standards need not come from state law; conflicts of law principles would govern the choice of applicable law. *See* Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, *supra* note 5, at 1473 n.142 & 1497–1501.

47. The domestic legal standards that define when a foreign corporation may be sued for the acts

piercing the corporate veil is diffuse and ambiguous, and transferring it to the jurisdictional context would introduce a new layer of ambiguity.[48]

III. A Due Process Model of Equitable Jurisdiction Over Foreign States

Rather than attempting to apply the existing domestic law of piercing the corporate veil to assert jurisdiction, the judiciary should develop a body of federal common law[49] that draws on the institutional strengths of courts: their ability to address factual uncertainty by allocating burdens of pleading and proof, and their ability to reach reasoned decisions[50] based on principles that the international community of states recognizes.[51]

This Note proposes an exclusive set of circumstances that would trigger veil-piercing to reach a foreign state not directly involved in the acts in

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of a juridically separate entity would offend foreign sovereigns if applied to government-owned corporations. Courts in the United States often assert personal jurisdiction over foreign corporations on the basis of broad, vague standards that do not take foreign sovereignty into account. *See* Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981) (personal jurisdiction over Japanese corporation that used subsidiaries to penetrate New York market); Andrulonis v. United States, 526 F. Supp. 183, 189, 191 (N.D.N.Y. 1981) (personal jurisdiction over defendant foreign manufacturer that was held to share sufficient "corporate intimacy" with domestic distributor; dictum that litigation in a foreign jurisdiction is price that companies active in international trade must pay). The New York Court of Appeals found that a corporation is present when a service does all the business that the foreign corporation could do were its own officials in the forum state. Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *remittitur amended*, 20 N.Y.2d 737, 229 N.E.2d 696, 283 N.Y.S.2d 99, *cert. denied*, 389 U.S. 923 (1967). The Second Circuit adopted this test in Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir.), *cert. denied*, 390 U.S. 996 (1967), ruling that a foreign corporation is doing business in New York when its New York representative provides services sufficiently important to the foreign corporation that, if it did not have a representative, the corporation's own officials would undertake to perform similar services. If applied to a foreign state, this test would subject the state to equitable jurisdiction whenever a factually as well as nominally distinct entity (not necessarily an instrumentality) engaged in investment or sales activity that the foreign state could do if it had chosen to enter New York on its own. Such assertions of jurisdiction would display no respect for foreign sovereigns, and might result either in retaliation or in a cessation of all activity that conceivably substitutes for the foreign state's own commercial activities in the U.S. forum.

48. *See* E. Latty, Subsidiaries and Affiliated Corporations 191 (1936) (many tests to guide courts are illusory and give no intelligible principle); Comment, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 Pac. L.J. 1245, 1246 (1982) (piercing doctrine has been applied inconsistently and confusingly).

49. *See supra* note 24.

50. Reasoned written decisions rendered by a court provide notice to guide future conduct, preserve a record for appeal, and heighten the sense that principles rather than *realpolitik* have operated. Even the abstention inquiry in Part IV, *infra*, is based on principles of judicial self-restraint rather than mere susceptibility to political pressures.

51. Because international law is relevant to the federal court's equitable decision to take jurisdiction, the court must find and apply international principles. Just as a court must resolve any constitutional issues necessary to reach its decision, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), a court must interpret international legal questions that arise in its deliberations. International law is part of the law of the United States, which courts must ascertain and administer whenever questions of right depending upon it are duly presented for their determination. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (applying international legal rule that coast fishing vessels peaceably engaged are exempt from capture as prize of war).

question. If the plaintiff fails to plead and to support[52] one or more of these circumstances, his claims against the foreign state should be dismissed for lack of subject matter jurisdiction, on motion of the state[53] or *sua sponte*.[54] By imposing a high initial burden on the plaintiff to overcome a presumption of juridical separation, this proposal recognizes the deference normally due to a foreign state.[55] Moreover, in determining when a plaintiff has overcome the presumption, this proposal relies on the principles of international law. By turning to international law, courts will follow the intent of Congress.[56] They will also draw on ideas of fundamental fairness that bind all sovereign states.[57]

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52. Before ruling on a motion to dismiss, the court may grant limited discovery. The granting of discovery orders, however, must be tempered by an awareness of their potential to damage friendly relations between states and of special governmental privileges for state secrets. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019 (1970 & Supp. 1984); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 comment c (Tent. Draft. No. 3, 1982) (court cannot compel discovery of communications privileged when made); *cf.* Ghana Supply Comm'n v. New Eng. Power Co., 83 F.R.D. 586, 595 (D. Mass. 1979) (by initiating suit through corporation under its control, Ghana waived any governmental privilege and must decide whether secrecy of materials ordered to be produced is worth dismissal of suit).

For the same reasons of comity, FED. R. CIV. P. 37(b)(2) sanctions should be used extremely sparingly and only after the foreign state has had adequate opportunity to come forward with evidence on its own or otherwise to demonstrate good faith. *See In Re* Oil Spill by The Amoco Cadiz, 93 F.R.D. 840, 843 (N.D. Ill. 1982) (refusing to impose sanctions on France for failure to comply with discovery orders where non-compliance was neither willful nor in bad faith but required by French non-disclosure statute). The Restatement draft would limit sanctions to "cases of deliberate concealment or removal of information" or of failure to "make a good faith effort to secure permission from the foreign authorities to make the information available." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 (2)(b), (a) (Tent. Draft No. 3, 1982). *Cf.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 708 (1982) (upholding sanction of personal jurisdiction over non-sovereign corporate entity that had notice of possible sanction and ample opportunity to comply).

53. FED. R. CIV. P. 12(b)(1).

54. The court has a duty to dismiss the action *sua sponte* if the foreign state does not appear and the evidence is inadequate to support jurisdiction. *See* 28 U.S.C. § 1608(e) (1982) (requiring evidence satisfactory to court before judgment by default is entered).

55. If the foreign state fails to make the necessary showing, and the court determines that it may take jurisdiction over the foreign state, the state would then have to defend the suit or face default judgment. A state could only attack this judgment collaterally if it neither contested jurisdiction nor litigated the merits. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 706 (1982) (defendant may either ignore judicial proceedings and bring collateral challenge to default judgment on jurisdictional grounds or challenge jurisdiction in initial proceeding, thus agreeing to abide by court's determination of jurisdictional issue); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 n.9 (D.C. Cir. 1982) (dicta) (defendant that district court subjected to arbitration by default could raise jurisdictional issue as collateral attack on holding of proceeding to confirm arbitral award), *cert. denied*, 104 S. Ct. 71 (1983).

56. The veil-piercing inquiry proceeds under the FSIA. *See supra* p. 398. Congress intended that this statute would make U.S. law on sovereign immunity consistent with international law. *See* McKeel v. Islamic Republic of Iran, 722 F.2d 582, 587 (9th Cir. 1983) (applying international law under FSIA to bar tort action for damages suffered at U.S. embassy in Iran); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981) (interpreting international law to deny immunity for commercial activity of cement contracts and letters of credit), *cert. denied*, 454 U.S. 1148 (1982); HOUSE REPORT, *supra* note 3, at 7–9. Therefore, any determination of equitable jurisdiction, which is also an interpretation of the FSIA, must accord with international principles.

57. International law accepts that piercing the corporate veil in appropriate circumstances is con-

Should the plaintiff substantiate allegations of indirect wrongdoing by the foreign state, the burden then shifts to the foreign state.[58] The state would have to demonstrate why the court should respect juridical separation by declining jurisdiction.

Before discussing the circumstances that should shift the burden of proof to the foreign state, two procedural postures need to be distinguished. In the first, a private entity as plaintiff seeks to pierce the veil and recover from the state because the foreign instrumentality, the primary defendant, lacks assets in the United States or has dissolved. In the second, a private entity as defendant moves that the court require the foreign state as plaintiff to answer a counterclaim for the acts of its instrumentality.

A decision in the first posture to equate the two entities will impose a greater burden on a foreign entity to appear and defend, and is more likely to offend the foreign state. In the counterclaim posture, in contrast,

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sonant with fair play and substantial justice. General principles of law recognized by civilized nations, and the writings of qualified jurists, are two sources that give rise to valid rules of international law. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993. General principles of law and the writings of jurists support the idea that a foreign state may not always rely on the presumption of corporate separateness. Equity (in the sense of general rules dictated by fairness, impartiality, and justice) is a part of international law. *See* Murty, *Settlement of Disputes*, in MANUAL OF PUBLIC INTERNATIONAL LAW 673, 691 (M. Sørensen ed. 1968); Jennings, *General Course on Principles of International Law*, 2 RECUEIL DES COURS 323, 343 (1967). The International Court of Justice and its predecessor, the Permanent Court of Justice, have recognized the general principles of preventing abuse of rights and prohibiting a party from taking advantage of its own wrong. *See* Waldock, *General Course on Public International Law*, 2 RECUEIL DES COURS 1, 58-59 (1962).

More specifically, in Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5), Belgium sought to sue Spain for alleged injuries that Belgian nationals, as shareholders of a Canadian corporation, had suffered. The issue was whether the injury of the Canadian corporation could be attributed to the Belgian shareholders in order to confer standing on Belgium. The International Court of Justice found that Belgium lacked standing, but its discussion of whether the court could pierce the veil posed by the corporation's Canadian incorporation revealed that international law admits equitable piercing of the corporate veil. The Court observed that the distinction between the company and the shareholders was derived from municipal law, and that international law refers to "rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares." *Id.* at 37. On the international plane, the Court concluded, "municipal law indicates that the veil is lifted . . . to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations." *Id.* at 39.

58. The FSIA does not definitively state how burdens of proof should be allocated. Courts may view a claim to immunity as a jurisdictional issue under 28 U.S.C. § 1330(a) (1982), but the burden of proving the claim is on the foreign state, as it is in an affirmative defense. *See* HOUSE REPORT, *supra* note 3, at 17 (treating claim of immunity like affirmative defense for purpose of burden of proof). Courts have treated sovereign immunity as an affirmative defense, insofar as they have placed the burden of pleading and ultimately proving it on the defendant state. *See* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378 (5th Cir. 1980); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 389 n.16 (D.N.J. 1979). In light of the FSIA's ambiguity, courts could reasonably require the plaintiff to make out an initial case for jurisdiction over the foreign state, then require the state to come forward with its affirmative claim of immunity by virtue of its factual as well as juridical separation from the sued instrumentality. The state's failure to present a satisfactory claim would help the court to determine that it may take jurisdiction.

the foreign entity has availed itself of the judicial process of the United States.[59] By entering court, this foreign entity is on notice that it may have to answer a counterclaim on behalf of a related entity. Attributing the acts of one entity to the other in this counterclaim situation is therefore less subject to due process objections, and will require a lesser factual showing than is required to initiate a claim against a defendant foreign state.[60]

A. *"Alter Ego" and "Shell"*

Two alleged characteristics of a corporate instrumentality, "alter ego" and "shell," if supported by the record, should enable the plaintiff to obtain jurisdiction in either a claim or counterclaim situation.[61] In the alter ego case, the instrumentality against which the plaintiff has a direct claim was never really separate from the foreign state. The foreign state treated the assets of the corporation as its own and added or withdrew capital from the instrumentality at will.[62] The two entities did not maintain separate records or formalities. A plaintiff could not tell with which entity he was negotiating, or could justifiably have believed he was negotiating with the foreign state.[63]

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59. Prior to the FSIA, the Supreme Court recognized in National City Bank v. Republic of China, 348 U.S. 356 (1955), that "consideration of fair dealing," *id.* at 365, dictated that a foreign government could not invoke United States law while resisting a claim against it that would curtail its recovery. *Id.* at 361–62. The Republic of China, suing a U.S. defendant on behalf of an agency, unsuccessfully argued sovereign immunity as a defense against defendant's counterclaim for defaulted treasury notes of the Republic. *See also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (plurality opinion) (American bank, sued by one of Cuba's incorporated instrumentalities, may counterclaim against Cuban government for seizure of American property).

60. The Supreme Court implicitly reasoned that due process did not preclude an equitable counterclaim in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983). The American bank was permitted to assert against the Cuban bank (Bancec) a debt that Cuba owed to the American bank, although Bancec was not a party to any proceeding adjudicating the liability of Cuba to the American bank.

The Court's opinion did not address the question whether allowing a setoff violated Bancec's due process rights. This omission is best explained by the tenuousness of any due process claim. *See* DeLetelier v. Republic of Chile, 567 F. Supp. 1490, 1503 (S.D.N.Y. 1983) (concluding that due process similarly does not preclude *execution* against assets of Chilean national airline to satisfy *judgment* against Chile).

61. The plaintiff would serve process on both the instrumentality, if still existing, and the foreign state under the provisions of 28 U.S.C. § 1608 (1982).

62. Foreign jurisdictions have also applied the equitable principle of ignoring corporate forms. *See* Wallersteiner v. Moir, [1974] 3 All E.R. 217, 237–38 (C.A.) (holding defendant personally liable for activities of companies, trusts, and other legal entities that he treated as his puppets); Europemballage Corp. v. Commission of the European Communities, 1973–1 C.J. Comm. E. Rec. 215, 242, [1971–1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171 (1973) (imputing conduct of subsidiary to parent company for jurisdictional purposes). For an extreme example of veil-piercing, see X. v. Czechoslovakia, Sz 23/143, Supruchreportorium Wo. 28 Neu. (Sup. Ct. Austria 1950), *reprinted in* UNITED NATIONS, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 183, 183 (1982) (respondent found to be Czechoslovakia, even though it engaged in business under another name; use of firm name does not bring into existence new legal entity distinguishable from owner of firm).

63. For an example of this type of abuse of the corporate form in a domestic context, see Clarke

In this circumstance, asserting jurisdiction over the foreign state would not invade its due process rights. The foreign state, acting through its instrumentality, has engaged in commercial activity touching the United States.[64] The involvement of the foreign state in the act giving rise to subject matter jurisdiction is clear. Because the state and the instrumentality were factually indistinguishable from each other for the activities on which the plaintiff's claim is founded, the act of the instrumentality is in effect the act of the state.

In the shell situation, the state and the state-owned instrumentality operated independently in appearance, but the instrumentality was so seriously undercapitalized that it could not meet reasonably expected obligations. Full capitalization is the prerequisite of limited liability.[65] Therefore, the owner of a mere shell should not be able to rely on its juridical separateness.[66] The undercapitalization of the subsidiary furnishes the requisite nexus between the foreign state and the instrumentality's wrongdoing. In effect, the acts of an undercapitalized instrumentality represent the foreign state's own commercial activity outside of the United States with effects within the United States.

B. *Agency for the Specific Transaction*

The foreign state and the instrumentality may be juridically separate, factually distinct, and adequately capitalized, yet in a particular transac-

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Auto Co. v. Fyffe, 124 Ind. App. 222, 116 N.E.2d 532 (1954) (finding two corporations merged for purpose of suit because innocent third parties had no way of knowing with which corporation they were dealing).

64. Under this analysis, the plaintiff in Gibbons v. Republic of Ireland, 532 F. Supp. 668 (D.D.C. 1982) would be unsuccessful in making the required threshold showing of alter ego or shell. The plaintiff attempted to sue Ireland as principal for false representations and tortious interference with contractual relations committed by the country's alleged agents, two instrumentalities of the government. The plaintiff only alleged that the government's ministries had the authority to control certain of the instrumentalities' operations and that the instrumentalities pursued the economic development policy of the Republic. The plaintiff did not support an allegation that Ireland was an alter ego of the instrumentalities, or used them as shells. Ireland's motion to dismiss a suit based on an alter ego or shell theory would therefore be granted at an early stage. Because plaintiff did not allege that Ireland specifically authorized the instrumentality to commit the alleged torts, a motion to dismiss based on an agency theory, *see infra* p. 409, would also be granted.

65. *See* H. BALLANTINE, BALLANTINE ON CORPORATIONS 302–03 (1946) (shareholders of corporation doing business without sufficient assets to meet prospective liabilities may not escape personal liability).

66. Inadequate capitalization of the corporation to provide for payment of foreseeable creditors' claims leads courts to pierce the corporate veil. *See* Anderson v. Abbott, 321 U.S. 349, 362 (1944) (obvious inadequacy of capital is frequently important factor in cases denying limited liability to shareholders); Minton v. Cavaney, 56 Cal. 2d 576, 579, 364 P.2d 473, 475, 15 Cal. Rptr. 641, 643 (1961) (inadequate capitalization constitutes ground for imposing shareholder liability); *cf.* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 39 (veil is lifted to protect creditor or to prevent evasion of legal requirements or obligations); Companies Act 1981 of Australia, § 556(1), *cited in* H. FORD, PRINCIPLES OF COMPANY LAW 146 (1982) (holding director liable if company incurs debt when reasonable grounds exist to expect it will not be able to meet all its debts and company later fails).

tion the instrumentality may act as the state's agent. The instrumentality's amenability to United States subject matter jurisdiction then suffices to subject the state as principal to jurisdiction for claims founded on that particular exercise of agency authority.[67] A plaintiff who alleges that the instrumentality acted in a particular transaction as the state's agent should therefore be allowed to reach the foreign state for claims founded on that transaction. This limitation to the particular scope of the principal-agent relationship makes more stringent the domestic law standard of agency relationship or control required to subject a foreign corporation to suit.[68]

C. *Joint Adventurers*

A third set of facts should enable a counterclaiming defendant in United States court, but not a plaintiff, to equate the identities of the two joint adventurers when only one of them has brought suit. Assume the instrumentality was neither an alter ego, a shell, nor a designated agent. The state's and the instrumentality's sequences of moves into court and activities outside of court may still have the effect of enabling one party to escape the jurisdiction of a United States court while the other reaps the benefit of access to court on a distinct cause of action. Three patterns are distinguishable.

In the first, the entity breaches a commercial contract or commits a tort in the United States and the state either orders the entity to cease business in the United States or dissolves it. If the state does not take further steps in this country, the cause of action will not be within the effective jurisdiction of United States courts. Dissolution of an entity ends its legal existence. But a different situation arises if the state then sues on another cause of action.[69] By acting in this manner, the state may sometimes equitably identify itself with the instrumentality that had the requisite contacts for United States jurisdiction over the original contract or tort dispute. The state creates an inference that it abused corporate formalities. The

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67. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) (actions of defendant in forum and actions relevant to transaction by agent on defendant's behalf may support personal jurisdiction), *cert denied*, 454 U.S. 1148 (1982); *see also* European Convention on State Immunity, art. 7, May 16, 1972, Europ. T.S. No. 74 (denying immunity to signatory state if it has on territory of forum state an office or agency through which it engages in industrial, commercial, or financial activity, and proceedings relate to that activity of office or agency).

68. *See supra* note 47.

69. *Cf.* C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego 'Rolimpex,' 1979 A.C. 351 (H.L.), in which the parent government did prevent the instrumentality from continuing its business but did not seek access to the British courts. The House of Lords affirmed a decision that Rolimpex, a Polish state trading enterprise, could successfully assert a defense of *force majeure* in an action for breach of contract to sell sugar overseas. Lord Wilberforce allowed Rolimpex's defense that the Polish government had instituted a ban on the foreign sale of sugar. The enterprise could not be regarded as an organ of the state absent clear evidence and definite findings that the foreign government took the action "purely in order to extricate a state enterprise from contractual liability." *Id.* at 364.

state may rebut the inference by showing that the dissolution was in the normal course of business and not designed to thwart creditors.[70] Shifting the burden is appropriate because the state, not the plaintiff, has the information necessary to establish the bona fide reasons for the instrumentality's dissolution.[71]

In the second pattern, the state wrongfully harms a domestic plaintiff, and the state's instrumentality sues in United States court for an unrelated cause of action. If the facts of this unrelated cause of action suggest that the foreign state is the real party in interest, subjecting the instrumentality to a counterclaim based on the state's harm to the plaintiff may be equitable.[72] Once again, the burden of rebuttal shifts to the instrumentality to demonstrate that the instrumentality's assets did not pass to the state, thereby rendering the state the real party in interest. Like the first pattern, the second describes the inequity of a foreign state's avoiding a counterclaim by using corporate forms.

The third pattern presents an even stronger equitable case for a counterclaim against the instrumentality. A foreign state wrongfully harms a domestic party, then creates an instrumentality whose operations are made possible by that wrong. The instrumentality then sues the domestic party in the United States on a cause of action arising out of those operations.[73] Allowing a counterclaim against the instrumentality is necessary in order to deny to the instrumentality the double benefit of immunity for the wrong of its joint adventurer, the foreign state, and of enforcement in

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70. This presumption of bad faith has an analogy in state bankruptcy law. A conveyance rendering a person insolvent is deemed fraudulent to a creditor without regard to actual intent if the conveyance is made without a fair consideration. *See* N.Y. DEBT. CRED. LAW § 273 (McKinney 1945 & Supp. 1983).

71. The issue raised is a factual one. The facts are most likely to be easily accessible to the foreign state; indeed, because of foreign secrecy laws, they may be unavailable to the plaintiff through discovery. *See* Kane, *supra* note 4, at 420–21 (placing burden of rebuttal on party best able to provide necessary information is proven guide for allocation and is sanctioned by Congress).

72. The foreign state has become the real party in interest because the instrumentality, before bringing suit, transferred its claim to the foreign state as part of a non-fraudulent transaction. The majority opinion accepted the view that Cuba became the real party in interest in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983). The record, however, did not clearly establish whether the government of Cuba had received the defunct instrumentality's assets and liabilities. *Id.* at 2604–05 (Stevens, J., concurring in part and dissenting in part). Becoming the real party in interest is distinguishable from a fraudulent transfer, *infra* note 76, which renders the foreign state itself a wrongdoer rather than merely subjecting the state to counterclaims for some prior wrongdoing.

73. *See* Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co., 543 F. Supp. 1224 (W.D. Mich. 1982), *rev'd sub nom.* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984), in which Ethiopia expropriated a spice-sugar plant, which became a state instrumentality. The new instrumentality then sued in United States court to collect on invoices for sugar already shipped before the expropriation. *See also infra* note 74 (similar facts).

United States court of the instrumentality's claim to proceeds deriving from the same wrongdoing.[74]

D. *"Same Asset" Pattern*

If a domestic plaintiff's allegations fall within the "same asset" pattern, the court should not take jurisdiction over the foreign entity. In this pattern, the entity wrongs the plaintiff, then passes specific property related to that legal wrong to a foreign state in a bona fide transaction. Not seeking access to court, the foreign state is tied to the instrumentality's wrongdoing only by possession of property that arose out of the transaction on which the claim against the entity is based.[75] The domestic plaintiff should not be allowed to compel an appearance by the foreign state, unless the instrumentality's conveyance of the property to the foreign state was fraudulent.[76]

Absent fraud, an exercise of jurisdiction over the foreign state would display no regard for legal separation of entities and might provoke retaliation by foreign courts. No causal nexus exists between the foreign state's coming into possession of assets after the instrumentality used or obtained them in injuring the plaintiff, and the act of the instrumentality. To accept this rationale for disregarding the normal separation of the state from

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74. If, on the other hand, the foreign entity has not availed itself of U.S. judicial process, it cannot be made to answer as defendant for a nationalization committed by the state. In Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 254 (7th Cir. 1983), the government of Nicaragua nationalized plaintiff's corporation. Plaintiff then accepted delivery of food from ENCAR, an agent operating the expropriated company, without paying, and sought a declaratory judgment that it could offset the value of its expropriated holdings against the value of the food purchased. The court dismissed the suit, holding that the *Republic of China* rationale, 348 U.S. 356 (1955), for allowing a counterclaim based on the expropriation did not come into play unless and until ENCAR sued on the debt.

75. This situation is distinct from the one described in 28 U.S.C. § 1605(a)(3) (1982), which denies immunity to a foreign state when rights in property taken in violation of international law are at issue and that property, or any property exchanged for such property, is present in the United States under specific circumstances.

76. The state would not be insulated from suit if it fraudulently accepted property of the instrumentality in order either to shelter the instrumentality from suit or, in the extreme case, to bring the instrumentality into insolvency.

This situation presents a stronger equitable case for suing the foreign state than does the situation described *supra* p. 410. There the foreign state is the real party in interest, so that a counterclaim against it is appropriate. Here the foreign state is not merely the beneficiary of the instrumentality; it has aided and abetted the instrumentality in its escape from judgment. Therefore the creditor of the instrumentality should be able to sue the state to reach the property that the instrumentality, in attempting to avoid liability, fraudulently conveyed.

State debtor-creditor law provides a domestic analogy. New York's fraudulent conveyance statute, for example, declares fraudulent every conveyance made by (1) a person who is rendered insolvent if the conveyance is made without a fair consideration; (2) a person engaging in a business for which the property remaining in his hands after the conveyance is an unreasonably small capital; or (3) a person who intends to incur debts beyond his ability to pay as they mature. The creditor may have any fraudulent conveyance set aside or may attach the property conveyed as against any person except a bona fide innocent purchaser. N.Y. DEBT. & CRED. LAW §§ 273–75, 278 (McKinney 1945 & Supp. 1983).

its instrumentality would taint the state with the wrongdoing of the instrumentality after the fact and without any independent wrongdoing on the part of the state.[77]

IV. Prudence and Abstention

The above analysis will enable courts to identify the minimum showings by a plaintiff that will support jurisdiction over a foreign state for indirect involvement in the acts of its instrumentality. Courts, however, may also choose as a matter of prudence to abstain from asserting jurisdiction in order to protect comity.[78] The doctrine of judicial abstention vis-a-vis foreign states[79] should inform the decision to assert or decline jurisdiction over a foreign state that has unfairly taken advantage of corporate forms.[80]

The abstention inquiry, which employs a jurisdictional rule of reason,[81] weighs the perceived need for the court to assert jurisdiction[82] against the

77. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), in which the ultimate issue was whether title to the sugar had passed to Banco Nacional. That issue turned on whether the expropriation of the sugar had violated international law and was therefore incapable of creating valid title in the expropriator.

78. *See* Restatement of the Foreign Relations Law of the United States § 403 comment a (Tent. Draft No. 2, 1981) (courts in exercising jurisdiction have interpreted acts of Congress of undefined scope so as to limit their reach).

79. *See* Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 Yale L.J. 765, 786-88 (1982) (discussing judicial abstention doctrine).

80. Both the extraterritorial application of U.S. antitrust law and the decision to pierce the veil of a foreign state instrumentality involve exercises of jurisdiction to protect broadly defined American economic interests. Since this jurisdiction may conflict with the legislation, foreign policy objectives, or judicial proceedings of foreign states, comity requires U.S. courts to consider the possibility of abstention where necessary to avoid intrusive overreaching into the internal affairs of foreign states. Declining jurisdiction whenever a foreign state would be likely to object, however, would overlook the interests of parties seeking relief against the foreign state. Courts therefore seek to weigh these factors through a balancing test. *See infra* notes 81-85 and accompanying text.

Similarly, courts that issue and enforce discovery orders must maintain authority over their own procedure while demonstrating respect for the foreign state against which discovery is sought. These two imperatives, however, are accommodated within a two-step process in which the court first decides whether to compel discovery. *Compare* Societe Internationale v. Rogers, 357 U.S. 197, 205-06 (1958) (foreign nondisclosure laws do not preclude court from ordering production of documents abroad) *with* United States v. First Nat'l City Bank, 396 F.2d 897, 902-04 (2d Cir. 1968) (balancing national interests of U.S. against those of foreign state in its bank secrecy law in order to determine whether a bank had to comply with U.S. grand jury subpoena). In the second step, the court decides whether to impose sanctions on a foreign state for non-compliance with the discovery order. *See* Restatement of the Foreign Relations Law of the United States § 420 comment f (Tent. Draft No. 3, 1982). The decision of whether to abstain from exercising equitable jurisdiction over a foreign state resembles the decision of whether to assert antitrust jurisdiction abroad, because it must be taken at a single stage of the court's proceedings.

81. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 549 F.2d 597, 613 (9th Cir. 1976) (establishing jurisdictional rule of reason approach), *complaint dismissed on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (applying jurisdictional rule of reason approach). *See also* Restatement of the Foreign Relations Law of the United States § 403 (Tent. Draft No. 2, 1981) (state may not exercise jurisdiction unreasonably).

82. In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979), the court investigated the following factors, *inter alia*, in deciding whether to assert jurisdiction: (1) de-

benefits of declining jurisdiction.[83] If the plaintiff has succeeded in establishing a factual basis for jurisdiction, the need to exercise jurisdiction will normally exist.[84] But the abstention calculus also focuses on any harmful effects that an assertion of jurisdiction might trigger and that abstention would avoid. For example, the potential for conflict with another state and the unavailability of a remedy even if judgment is rendered against the foreign state would both suggest abstention.[85] In this inquiry, the role of the executive branch as a source of information may be vital.[86] An

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gree of conflict with foreign law or policy; (2) nationality of the parties; (3) availability of a remedy abroad and pendency of litigation there; (4) existence of intent to harm or affect American commerce and its foreseeability; (5) whether relief would require a party to perform an act that is illegal in either country or to meet conflicting obligations in the two countries; (6) whether an order for relief would be acceptable in this country if a foreign state made the order under similar circumstances; (7) whether a treaty with the affected nations addresses the issue. *See also* Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 549 F.2d 597, 613–15 (9th Cir. 1976) (court should weigh contacts and interests of U.S. against those of foreign states).

83. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979), looked to the following factors: (1) the relative importance of the alleged violation of conduct here compared to that abroad; (2) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (3) whether the court can make its order effective. *See also* Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 549 F.2d 597, 614 (9th Cir. 1976) (court should assess degree of conflict to be precipitated by exercise of jurisdiction).

84. The need for jurisdiction is established by weighing concerns for the protection of uniquely American interests against those for safeguarding alternative remedies. *See supra* note 82. The federal government has a strong interest in protecting overseas trade and investment and in maintaining legal standards for that purpose. Brief for the United States as Amicus Curiae in Support of Petitioner at 1, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983). *See also* 1976 Hearings, *supra* note 41, at 27 (statement of Monroe Leigh, Legal Adviser to the State Department) (no justification in international law for allowing foreign state which has entered marketplace or acted as private party to shift everyday burdens of marketplace onto private parties).

In some circumstances, however, the need for U.S. jurisdiction may be less compelling because a treaty between the U.S. and the involved foreign state disposes of the issue. The availability of suit abroad may also diminish the necessity for a U.S. court to examine conduct of a foreign state. Under forum non conveniens analysis, the availability of suit abroad is a necessary but not sufficient condition for dismissal. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–07 (1947). In deciding whether the availability of an alternative forum eliminates the need for it to exercise jurisdiction, the U.S. court evaluates the plaintiff's private interests, the relative inconvenience to the parties of the two fora, and the potential forum's interest in hearing the case. *Id.* at 508–09. *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (overcomes strong presumption in favor of resident or citizen plaintiff's choice of forum when private and public interest factors clearly point toward trial in alternative forum).

85. Congress has approved the rule of reason approach followed in Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 549 F.2d 597, 613 (9th Cir. 1976). The Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, modified the Sherman Act to require a direct, substantial, and reasonably foreseeable effect on trade or commerce with foreign nations as a jurisdictional threshold for application of the antitrust statute. Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (codified at 15 U.S.C. § 6(a) (1982)). The legislative history of this provision states that it is "intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions." If a court determines that it has subject matter jurisdiction, the provision would not affect the court's ability to employ notions of comity as it did in *Timberlane* or otherwise to take account of the international character of the transaction. H.R. REP. NO. 686, 97th Cong., 2d Sess. 13, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487, 2498.

86. The executive branch may provide information to the court, but its position on immunity would not be dispositive. *See supra* notes 41 & 44. The executive branch's limited role is consistent with the expectations of the State Department that the FSIA would depoliticize the area of sovereign

amicus brief by the United States, particularly if the foreign state made no appearance, would inform the court of particular foreign sensitivities, relevant principles in the foreign state's own legal system, and the availability of funds from which a judgment could be collected.

Conclusion

The courts should follow a two-step inquiry in determining jurisdiction over a foreign state that has attempted to distance itself from its responsibility for the injurious acts of one of its instrumentalities. First, courts should identify the allocation of burdens of pleading and proof between the party seeking relief and the foreign state. This procedure determines whether taking jurisdiction over the foreign state would serve fundamental fairness. The proposed analysis also enables courts to work within the framework imposed by Congress to bring uniformity to the threshold determination of whether jurisdiction is permissible. The due process clause limits how far courts may reach, ensuring a generalized respect for foreign sovereigns and specifying whether plaintiffs may summon a foreign state into court when suing the nominally separate entity is inconvenient or impossible.

Second, even if the facts allow jurisdiction because the instrumentality was an alter ego, shell, agent, or joint adventurer of the foreign state, courts should ensure that an assertion of jurisdiction is both necessary and potentially beneficial. In this way, the judiciary can strive to maintain the delicate balance between equilibrium in the conduct of foreign relations and relief for private plaintiffs that Congress attempted to strike in the FSIA.

—Ronald D. Lee

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immunity, placing responsibility for questions of immunity in the courts. The limited weight attached to positions taken by the U.S. government also reciprocates the approach of foreign states, which almost universally pass upon questions of sovereign immunity as a matter of law in the courts and not as a matter of foreign policy in the political branches. 1976 Hearings, *supra* note 41, at 31 (statement of Bruno Ristau).