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INTERNATIONAL LAW—THE FOREIGN SOVEREIGN IMMUNITIES ACT: DO TIERED CORPORATE SUBSIDIARIES CONSTITUTE FOREIGN STATES?

INTRODUCTION

In today's global economy, United States citizens increasingly come into contact with foreign corporations.¹ When a legal injury arises out of that contact, a United States plaintiff often finds to his or her surprise that the offending corporation qualifies for sovereign immunity under U.S. laws because of ownership, albeit partial and indirect, by a foreign government. The Foreign Sovereign Immunities Act ("FSIA"),² the sole basis of jurisdiction in federal and state courts for suits involving foreign governments,³ extends immunity protection not only to foreign states, but also to foreign corporations that are majority-owned by foreign states.⁴

The situation often arises that a corporation is not directly majority-owned by a foreign state, but through a parent/subsidiary structure is majority-owned by another corporation which is directly majority-owned by a foreign state. This hierarchical system of ownership is known as "tiering." Courts struggle with the issue of whether a particular entity in a "tiered" corporate structure fulfills the requirements of the FSIA's definition of a foreign state, thus enjoying the many protections afforded by the FSIA.⁵ A split between two federal courts of appeals recently developed over the

1. See generally PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW* (1993). The book examines the new multinational corporations that dominate our world economy today. The author points out ways that United States corporate law, developed when corporations were single entities, with one owner and one purpose, must change to accommodate this new corporate structure. See *id.* at 231-53.

2. 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (1994).

3. See *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 433 (1989).

4. See 28 U.S.C. § 1603(a)-(b) (1994). Section 1603(a) extends immunity protection to an entity which is an agency or instrumentality of a foreign state. Section 1603(b) defines an agency or instrumentality of a foreign state as an entity having a majority of shares or other ownership interests owned by a foreign state. See *infra* Part I.C.3 for the text of these sections.

5. See *infra* Part I.C.3 for a discussion of the benefits provided by the FSIA.

interpretation of the FSIA's requirement of majority ownership by a foreign state, as outlined in 28 U.S.C. § 1603(b).

This Note addresses the FSIA's requirement of majority ownership by a foreign state, under section 1603(b). It examines whether the FSIA requires that a foreign corporation have actual direct ownership by a foreign state, or whether by "tiering" ownership interests, a foreign corporation may claim protection because a parent company has majority ownership by a foreign state. Part I of this Note discusses the history of sovereign immunity as it developed in the United States and the congressional purpose in enacting the FSIA. This Part also reviews the statutory scheme in sections 1603(a) and (b) of the FSIA, and describes how the FSIA functions in theory and in practice. Part II describes the judicial treatment of tiering for the FSIA's first twenty years and presents the current division of opinion in the United States Courts of Appeals for the Ninth⁶ and Seventh⁷ Circuits. It also examines an alternative viewpoint on this issue found in a case from the United States District Court for the Southern District of New York.⁸ Part III examines the applicable sections of the FSIA using the traditional statutory interpretation methods employed by the Ninth and the Seventh Circuits, and concludes that traditional statutory interpretation offers no solution to the tiering issue. This Note suggests that a better analysis of this issue focuses not on examining whether Congress intended to include foreign corporations under the FSIA because they are majority owned by other agencies, but on examining what Congress meant by majority ownership by a foreign state. Part III suggests that in enacting the FSIA, Congress meant to protect only those corporations that are directly owned by a foreign state. Therefore, the FSIA, intended to provide a fair and predictable procedure allowing a United States plaintiff to sue a foreign corporation, did not intend to base immunity on a tiered corporate relationship.

I. BACKGROUND

A. *History of Foreign Sovereign Immunity in the United States*

1. Absolute Sovereign Immunity

Historically, foreign states sued in United States courts en-

6. See *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

7. See *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996).

8. See *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996).

countered uncertain and unpredictable treatment.⁹ Until the mid-1900's, foreign states enjoyed and expected absolute sovereign immunity.¹⁰ Under the concept of absolute sovereign immunity, a sovereign state is not, without its consent, subject to suit in its own or in foreign courts.¹¹ Absolute sovereign immunity became the law of the land in 1812 with the Supreme Court's seminal decision in *Schooner Exchange v. McFaddon*.¹² This decision became controlling authority for foreign sovereign immunity issues for the next 140 years.¹³

At the time the Court decided *Schooner Exchange*, it considered whether absolute sovereign immunity was the appropriate solution for every suit involving a foreign state. While holding that sovereign immunity absolutely protected a French naval ship in *Schooner Exchange*, the Court hinted that absolute immunity might

9. See H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605-06; see also Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT'L L. 159, 162-65 (1996) (examining the evolution of the doctrine of foreign sovereign immunity in the United States); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257-61 (1997) (presenting a thorough explanation of the history of sovereign immunity).

10. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 486 (1983); see also Dorsey, *supra* note 9, at 257-58; Abir, *supra* note 9, at 162-63.

11. The doctrine of sovereign immunity historically stems from the concept that "the King can do no wrong." More modern reasons for extending sovereign immunity are comity and the importance of following the customs of international law. See *Verlinden*, 461 U.S. at 486 (explaining that absolute sovereign immunity is "a matter of grace and comity"); see also H.R. REP. NO. 94-1487, at 8, reprinted in 1976 U.S.C.C.A.N. at 6606 (noting that absolute sovereign immunity was recognized in the United States as a doctrine of international law). Overall, the traditional rationale for absolute immunity was to avoid adjudication which might offend a foreign nation and embarrass the executive branch in its dealings with foreign nations. See *Foreign Sovereign Immunities Act, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 30 (1976) [hereinafter *1976 Hearings*]; see also Dorsey, *supra* note 9, at 257 (stating that the purpose of sovereign immunity "is to avoid friction in international relations").

12. 11 U.S. (7 Cranch) 116 (1812). In *Schooner Exchange*, a ship in Napoleon's navy was arrested in the Port of Philadelphia by two U.S. citizens who claimed it was rightfully theirs. Chief Justice Marshall granted the executive branch's request for immunity, stating that the Court had no jurisdiction over the government of a foreign state. See *id.* at 147. This case is consistently cited as the classic statement of the rule of absolute sovereign immunity. See, e.g., *Verlinden*, 461 U.S. at 486; *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 571-72 (1926); H.R. REP. NO. 94-1487, at 8, reprinted in 1976 U.S.C.C.A.N. at 6606.

13. It was not until 1952 that the State Department officially changed the foreign immunity policy of the United States to one of "restrictive immunity." See Letter from Jack B. Tate, Acting Legal Advisory of the Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 [hereinafter *Tate Letter*]. For an explanation of "restrictive immunity," see *infra* Part I.A.3.

not apply where a sovereign entered and participated in the marketplace.¹⁴ Thus, even at this early date, while adopting the absolute sovereign immunity doctrine, the Court raised an issue still being deliberated today: whether sovereign immunity protection should be afforded to corporations owned by a foreign state.¹⁵

2. The "Separate Entity" Rule¹⁶

In *Bank of the United States v. Planters' Bank*,¹⁷ Chief Justice Marshall, who wrote the majority opinion in *Schooner Exchange*, again spoke on the principles of sovereign immunity. He pointed out that a state-owned corporation is not necessarily a foreign sovereign.¹⁸ In *Planters' Bank*, because the state of Georgia (technically a foreign state) incorporated its bank, thereby conferring both a separate legal identity and the capacity to sue and be sued,¹⁹ the Court held that it "voluntarily strip[ped] itself of its sovereign character, so far as respects the transactions of the Bank, and waive[d] all the privileges of that character."²⁰ The Court therefore concluded that the bank could be sued in a United States court.²¹

14. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 123. The district attorney, arguing for the government, stated that "if a sovereign descend from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So if he charter a vessel, the cargo is liable for the freight." *Id.* Chief Justice Marshall seemed to agree when he stated that "there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power . . ." *Id.* at 145. However, 100 years later in *Berizzi Bros. Co. v. S.S. Pesaro*, the Court extended absolute sovereign immunity to commercial ships that were owned by a foreign state. See *Berizzi*, 271 U.S. at 574.

15. See generally Abir, *supra* note 9, at 179-82 (addressing the unfair advantage that immunity gives foreign corporations over domestic corporations); William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 571-77 (1991) (addressing the unfair advantage that immunity gives foreign corporations over United States' plaintiffs).

16. For a thorough discussion of the "separate entity" rule in theory, and as it has developed in the United States, see Hoffman, *supra* note 15, at 542-51.

17. 22 U.S. (9 Wheat.) 904 (1824).

18. See *id.* at 907. "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen." *Id.*

19. The Court based its ruling not on the commercial activity of the state owned corporation, but on the fact that the corporation had a legal personality separate from the state. Therefore, the suit was not against "the King" and the rationale for sovereign immunity did not apply. See *id.* at 907-08.

20. *Id.*

21. See *id.* at 908.

Chief Justice Marshall's reasoning provided the basis for the "separate entity" rule, a doctrine that developed in the United States separate from, but related to, the absolute immunity rule.²²

The "separate entity" rule provided that where a foreign-state-owned corporate entity has its own legal personality, distinct from its governmental shareholders, the underlying rationale for absolute immunity, "the King can do no wrong," ceased to exist. The foreign corporation may therefore be sued as any private corporation.²³ This rule in theory limited the absolute sovereign immunity doctrine, because courts could apply it to deny absolute immunity to defendant foreign corporations owned by a foreign state. In practice, however, due to confusion over the rule, courts applied the "separate entity" rule haphazardly, with most courts continuing to recognize an absolute theory of sovereign immunity in suits involving foreign-government-owned corporations.²⁴ Thus, U.S. citizens involved in commercial disputes with or injured by the tortious acts

22. See Hoffman, *supra* note 15, at 542-43 (explaining that because a suit against a state-owned corporation with a separate legal personality is not against the state itself, sovereign immunity does not attach at all unless the court finds that evidence of corporate separateness is insufficient).

23. See *Planters' Bank*, 22 U.S. (9 Wheat) at 907-08. The "separate entity" rule is still applied today by most Western countries. See Hoffman, *supra* note 15, at 542, 554 (explaining that while for most of the twentieth century Western nations used the "separate entity" rule in applying absolute sovereign immunity theory, the "separate entity" rule is still used today by all European countries and Great Britain in applying a more limited "restrictive" immunity).

24. See Hoffman, *supra* note 15, at 542-43. Hoffman describes how the "separate entity" rule was continually misused by courts when determining absolute immunity and later, under a more restrictive theory of immunity. See *id.* at 541-51. Because the Supreme Court never ruled on the application of the "separate entity" rule to sovereign immunity, lower courts were left without guidelines on how to determine whether a separate legal personality existed. Some courts turned to common law principals and agency concepts traditionally used in disregarding the corporate form, to determine the amount of control a foreign state exercised over the corporation, and thus whether a separate legal personality existed. See *id.* at 548. Courts looking to common law principles and agency concepts were split, however, on the proper test for control. See *id.* at 548 n.71. Other courts looked to the presence of a consent clause in the corporate charter, treating consent to be sued as a waiver of immunity. See *id.* at 549 n.75. After the Tate Letter, see *supra* note 13, in 1952, when the rule of immunity changed to the "restrictive" theory, courts ignored the "separate entity" rule altogether. See Hoffman, *supra* note 15, at 548. See *infra* Part I.A.5 for an explanation of the Tate Letter. For an explanation of "restrictive" sovereign immunity and how courts applied it, see *infra* Part I.A.3. To further the confusion, some courts then looked to the State Department for a determination of immunity based solely on political factors. See Hoffman, *supra* note 15, at 549; see also Sandra Engle, Note, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L.J. 1060, 1064 & n.23 (1993) (describing lack of uniformity of the courts' treatment of sovereign immunity).

of these corporations were left with no legal redress.²⁵

3. Restrictive Immunity

Over time, as sovereigns increasingly entered the marketplace and engaged in commercial activities, the rule in the United States gradually evolved from absolute sovereign immunity to restrictive immunity.²⁶ Under the doctrine of restrictive immunity, foreign governments acting within their governmental or public powers continued to receive absolute immunity from suit in United States courts. When acting as a private party in a commercial setting, however, foreign governments lost their immunity protection and became subject to suit.²⁷

Theoretically, a court examining whether to accord sovereign immunity first determined whether the entity being sued qualified as a foreign state, according to the "separate entity" rule. At this stage of the analysis, the court presumed that a foreign corporation was a distinct "separate entity" unless the foreign corporation proved otherwise.²⁸ In theory, most foreign corporations would not be granted foreign sovereign status, and would therefore not receive any immunity at all, absolute or restrictive, because they simply were not considered foreign states.²⁹

25. See Engle, *supra* note 24, at 1064.

26. As the Supreme Court suggested in dicta in *Schooner Exchange*, when a sovereign enters into the marketplace and acts as a private party, the justification for absolute sovereign immunity fails to exist. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 145. The difference between absolute immunity and restrictive immunity is fundamental. Absolute immunity is based on the *character* of a sovereign, and attaches in all cases because a sovereign may not be sued. Restrictive immunity, however, is based on the *act* which is the basis of the suit against the sovereign, and attaches only when the act is governmental in nature. See Hoffman, *supra* note 15, at 542 n.40. For an early example of the application of restrictive immunity, see *Mexico v. Hoffman*, 324 U.S. 30 (1945), where the Court denied immunity to a ship owned by the government of Mexico because it was being operated by a private commercial corporation. See *id.* at 38.

27. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487 (1983) (stating that under the restrictive theory, immunity is limited to cases arising from a foreign sovereign's public acts, and does not extend to suits involving a foreign sovereign's commercial acts); see also H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605; Abir, *supra* note 9, at 164-65; Dorsey, *supra* note 9, at 258.

28. See Hoffman, *supra* note 15, at 545-47 (stating that by the 1920's, foreign-government-owned corporations in banking, shipping, railroads, agriculture, and mining were granted or denied immunity according to the "separate entity" rule, based on evidence of their corporate separateness from their governmental owners).

29. See Hoffman, *supra* note 15, at 543 (explaining that the separate entity rule "supplies a presumption that incorporated entities do not enjoy immunity"). For examples of cases where courts followed the "separate entity" rule before applying the restrictive principle of immunity, see *Coale v. Societe Co-operative Suisse des Charbons*,

Only if a defendant foreign corporation overcame the presumption of corporate independence and the court deemed it to be an “agency” of the foreign state, would the court analyze the nature of the activity in question.³⁰ The court’s analysis turned on whether the corporation acted in a public (governmental) or private (commercial) capacity.³¹ If the court found that the corporation acted in a public capacity, the corporation was immune from suit.³² Conversely, if the court deemed the act private or commercial, as would be the case with many foreign-government-owned corporations, no immunity applied.³³ The court ruling compelled the foreign corporation to defend itself in court and subject itself to the same legal risks encountered by any other nongovernmental entity.³⁴

Basle, 21 F.2d 180 (S.D.N.Y. 1921) (holding that a Swiss-government-owned corporation for the importation and distribution of coal could be sued for breach of contract) and *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) (holding that a French-government-owned mining corporation could be sued because a corporation was not a government, even though it was majority-owned by a government).

30. See E.H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 3d 322, 340-42 (1970) (providing an explanation of how different courts determined instrumentality status before the FSIA).

31. See Hoffman, *supra* note 15, at 548-49. The courts at this time were also split on the proper public/private test to use in determining restrictive immunity. See *id.* Some courts looked objectively to the nature of the act itself, while other courts looked subjectively to the purpose of the act. See *id.* at 549 n.74. This conflict was resolved with the passage of the FSIA, as Congress clearly set the proper test as an objective one, examining the nature of the act, not the actor’s purpose. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 360-61 (1993). “[T]he commercial character of an act [in question] is to be determined by reference to its ‘nature’ rather than its ‘purpose,’ [therefore] the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives.” *Id.* at 360 (quoting *Argentina v. Weltover*, 504 U.S. 607, 614 (1992)).

32. See *Nelson*, 507 U.S. at 359-60. Explaining the difference between private and public acts for purposes of restrictive immunity, the Court stated that a state engages in public activity when it exercises “powers peculiar to sovereigns,” such as police power. *Id.* at 360. Furthermore, when a foreign state exercises these powers, even in a tortious manner, as in systematic police torture of an American citizen, the foreign state must be granted immunity from suit. See *id.* at 361.

33. See *Argentina*, 504 U.S. at 614. The Court explained that under the restrictive theory of immunity, a commercial activity is one where the state “exercises only those powers that can also be exercised by private citizens,” such as engaging in “trade and traffic or commerce.” *Id.* When the state so acts, it is liable to suit as would be any private citizen. See *id.*

34. See Hoffman, *supra* note 15, at 564-65 (describing how European countries today universally apply the separate entity rule before deciding if restrictive immunity applies, and arguing that this is the most practical method to treat state owned entities).

4. The Immunity Determination in Practice

In actual practice, however, courts looked less to the public or private nature of the foreign government's acts, and more to the policies of the State Department in determining issues of immunity.³⁵ In 1943, in *Ex Parte Republic of Peru*,³⁶ the Supreme Court held that given the nature of foreign immunity and separation of powers principles, United States courts must automatically defer to the executive branch when called upon to decide the issue of immunity.³⁷ The State Department, in turn, invariably adhered to the absolute rule of sovereign immunity.³⁸ The fate of a U.S. plaintiff with a complaint against a foreign-government-owned corporation depended not on the evidence of corporate separation from the foreign state, as per the "separate entity" rule, or on the nature of the act being sued on, as per the theory of restrictive immunity, but solely on the political status of the government that held ownership in the defendant corporation.³⁹ Therefore, rather than seeing an erosion of absolute immunity, actual practice demonstrated adherence to this outdated doctrine for political, rather than legal, reasons.

5. The "Tate Letter"

In 1952, the State Department, realizing that the United States treatment of foreign sovereigns was inconsistent with international law,⁴⁰ announced a modification of its previous immunity policy by issuing a letter from Jack Tate, Acting Legal Adviser of the Department of State, to Acting Attorney General Philip Perlman.⁴¹ The

35. See *Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) (stating the long accepted rule that federal courts must defer to the State Department's wishes concerning immunity of a foreign state, under the principle that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs"); *Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943) (stating that claims against friendly nations are normally settled under the foreign affairs powers of the President and the State Department); see also H.R. REP. NO. 94-1487, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

36. 318 U.S. 578 (1943).

37. See *id.* at 588; see also *Hoffman*, 324 U.S. at 32-33.

38. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 486 (1983) (stating that when reviewing immunity decisions, the Court has consistently deferred to the State Department that, until 1952, "ordinarily requested immunity in all actions against friendly foreign sovereigns").

39. See H.R. REP. NO. 94-1487, at 8, reprinted in 1976 U.S.C.C.A.N. at 6606.

40. See Dorsey, *supra* note 9, at 258-59 (explaining that the restrictive theory of immunity was the internationally accepted standard).

41. See Tate Letter, *supra* note 13, at 984-85 (listing countries that follow restrictive immunity and noting that little support was found for absolute immunity). The change in State Department policy can be directly attributed to the fact that the abso-

“Tate Letter” formally adopted restrictive immunity principles, stating that in the future, immunity should be granted in cases based on a foreign state’s public acts, but not in cases based on commercial or private acts.⁴² Under the Tate Letter principles, a defending foreign state could raise sovereign immunity as an affirmative defense before the court, or could petition the State Department for a ruling, binding on the court, that the acts in question were public and therefore immune.⁴³

B. *Substantial Need for a Uniform Rule*

1. United States Policy Was Unpredictable

Rather than having the desired effect of greater certainty in immunity cases, the Tate Letter generated more unpredictable results in United States courts.⁴⁴ When a foreign state petitioned the State Department for immunity, as was traditionally done, restrictive immunity supposedly applied, and the State Department then notified the court of its ruling.⁴⁵ However, although the Tate Letter set restrictive immunity as the official rule, courts granted absolute immunity in many cases, depending on diplomatic relations with the foreign state.⁴⁶

lute immunity extended to foreign sovereigns in United States courts was inconsistent with the restrictive immunity extended to the United States government by foreign courts. *See id.* at 985; *see also 1976 Hearings, supra* note 11, at 26 (“The Tate letter was based on a realization that the prior absolute rule of sovereign immunity was no longer consistent with modern international law.”); H.R. REP. NO. 94-1487, at 9, *reprinted in 1976 U.S.C.C.A.N.* at 6607 (stating that in the mid-1950’s, the United States, increasingly involved in foreign suits, was continually denied immunity by foreign courts applying restrictive immunity).

42. *See* Tate Letter, *supra* note 13, at 985; *see also* H.R. REP. NO. 94-1487, at 8, *reprinted in 1976 U.S.C.C.A.N.* at 6607; Dorsey, *supra* note 9, at 259.

43. *See* Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 385 n.3 (1982).

44. *See* *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487-88 (1983) (reviewing the confusing state of United States foreign immunity policy after the “Tate Letter,” but before the enactment of the FSIA).

45. The decision of whether to petition the State Department for immunity, or litigate the defense entirely in court, was left to the foreign state. *See* H.R. REP. NO. 94-1487, at 8, *reprinted in 1976 U.S.C.C.A.N.* at 6607; *see also 1976 Hearings, supra* note 11, at 26 (statement of Monroe Leigh, Legal Adviser, Department of State) (recognizing that a foreign state defendant usually chose to make a formal diplomatic request to have the State Department recognize its immunity). If the State Department allowed that immunity, the Justice Department would send the court a “suggestion of immunity.” *See* Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT’L L. 19, 20 (1986).

46. *See* *Verlinden*, 461 U.S. at 487 (“[P]olitical considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive

If a foreign state did not petition the executive branch, leaving the court to decide whether the particular entity's acts were protected by immunity, the court faced confusion on what test to apply.⁴⁷ Some courts first applied the "separate entity" rule to determine whether the entity in question was a foreign state, while others merely applied the restrictive immunity rule.⁴⁸ In applying the restrictive immunity rule, courts confronted additional confusion in determining whether a foreign state conducted a public or private activity.⁴⁹ Still other courts decided the immunity issue solely on consent, looking only to see whether the corporate charter contained an immunity waiver.⁵⁰ Thus, a U.S. plaintiff, faced with a suit against a foreign-government-owned corporation, could never predict where, how, or even if his claim would be heard.⁵¹

2. United States Policy Contrasted with International Practice

While other countries in the Western world were almost uniformly adopting the restrictive sovereign immunity rule, American law on the issue of immunity continued in a chaotic and unpredictable state.⁵² Moreover, in direct contrast to the United States, other countries decided the immunity issue through court analysis,

theory."); H.R. REP. NO. 94-1487, at 8-9, *reprinted in* 1976 U.S.C.C.A.N. at 6607 (acknowledging that although the State Department's official policy was the rule of restrictive immunity, the State Department often bowed to diplomatic pressure asserted by the foreign state); *see also* Dorsey, *supra* note 9, at 259 (stating diplomatic pressure could sometimes influence the State Department's decision); Feldman, *supra* note 45, at 20 (stating decisions of the State Department were often influenced by diplomatic considerations); Engle, *supra* note 24, at 1065-67 (suggesting that although restrictive immunity was the official policy of the State Department, political considerations still influenced its decisions).

47. *See* Abir, *supra* note 9, at 165. "Today, even after the passage of the FSIA, courts are still trying to determine the difference between a commercial and private activity of a foreign state." *Id.*

48. *See supra* Part I.A.2-3 for an explanation of the "separate entity" rule and its relation to the restrictive theory of immunity.

49. *See supra* notes 30-32 and accompanying text.

50. *See* Hoffman, *supra* note 15, at 549 & n.75; *see also* Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 COLUM. L. REV. 1086 (1965) (presenting a contemporaneous analysis of the confusion caused by inconsistent application of the restrictive immunity rule).

51. *See* H.R. REP. NO. 94-1487, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6607; Dorsey, *supra* note 9, at 259-60. To make matters worse, even in cases where a successful plaintiff received a judgment against a foreign state, there was no legal procedure allowing that plaintiff to actually execute the judgment. *See* Abir, *supra* note 9, at 165; Kane, *supra* note 43, at 407 n.116.

52. *See* Dorsey, *supra* note 9, at 258-59; Hoffman, *supra* note 15, at 536 n.5; Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANS-

rather than through diplomatic channels.⁵³ The United States, especially after World War II with its increased military presence in Western Europe, more often found itself involved in litigation in foreign courts.⁵⁴ Invariably, the Department of Justice instructed foreign counsel to plead sovereign immunity. Just as invariably, however, Western European countries denied their pleas, following closely the restrictive immunity rule.⁵⁵ U.S. corporations abroad were compelled to defend themselves in foreign courts at the same time that foreign-government-owned corporations doing business in the United States enjoyed immunity from lawsuits, granted either by the State Department or by the courts. The sharp increase in foreign-government-owned corporations entering the United States' marketplace only served to heighten the confusion and highlight the unfairness forced upon U.S. plaintiffs.⁵⁶ A sense of urgency developed, prompting Congress to act to correct the inequitable treatment encountered by U.S. citizens.⁵⁷

C. *The Foreign Sovereign Immunities Act of 1976*

1. Purpose of the Foreign Sovereign Immunities Act of 1976

Congress enacted the Foreign Sovereign Immunities Act of 1976⁵⁸ following many years of combined input from Congress, the Department of State, the courts, and the legal and academic com-

NAT'L L. 33, 38 (1978) (stating that all countries in Western Europe, with the sole exception of the United Kingdom, applied restrictive immunity).

53. See H.R. REP. NO. 94-1487, at 9, reprinted in 1976 U.S.C.C.A.N. at 6608; see also 1976 Hearings, *supra* note 11, at 26-27 (statement of Monroe Leigh, Legal Adviser, Department of State) (stating that allowing foreign states to petition the State Department for consideration of immunity left the United States at a distinct disadvantage, when it could not do the same in other countries, where sovereign immunity was decided exclusively by the courts).

54. See H.R. REP. NO. 94-1487, at 9, reprinted in 1976 U.S.C.C.A.N. at 6607.

55. See *id.*, reprinted in 1976 U.S.C.C.A.N. at 6607.

56. See *id.*, reprinted in 1976 U.S.C.C.A.N. at 6607.

57. See *id.*, reprinted in 1976 U.S.C.C.A.N. at 6608; Abir, *supra* note 9, at 165 (explaining that the chaotic situation over which rule to apply and the difficulties of enforcing a judgment against a foreign state "led the executive and legislative branches of the federal government to cooperate in an effort to resolve substantive and procedural confusion surrounding foreign sovereign immunity"); von Mehren, *supra* note 52, at 33 n.1 (stating that pressure on Congress to act began in 1961, after an unpopular decision in *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961) (holding that a grant of sovereign immunity issued by the State Department should be accepted without question by the court even when Cuba had specifically waived immunity)).

58. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (1994)).

munities.⁵⁹ Congress declared that the FSIA “serve[d] the interests of justice” and “protect[ed] the interests of both foreign states and litigants” by ensuring that all immunity decisions would be made by the courts under the principles set forth in the FSIA.⁶⁰ More specifically, Congress stated that the FSIA’s purpose was “to provide a procedure whereby a United States plaintiff could maintain a lawsuit against a foreign state or its entities and to provide a comprehensive substantive framework to determine when a foreign state is entitled to sovereign immunity.”⁶¹ Substantively, Congress intended the FSIA to codify the internationally accepted doctrine of restrictive immunity⁶² and to remove the decision making process from the State Department and place it with the judiciary,⁶³ thereby bringing the United States into line with international practice.⁶⁴ Procedurally, Congress intended the FSIA to provide a statutory framework for both obtaining personal jurisdiction over a foreign state and executing a judgment on a foreign state.⁶⁵ Overall, Congress intended the FSIA to ensure evenhandedness to United

59. See H.R. REP. NO. 94-1487, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6608. The FSIA, first introduced as H.R. 3493, 93rd Cong. (1973), was the subject of much debate and several amendments before finally winning the approval of the American Bar Association and the Maritime Bar Association in August of 1976. See H.R. REP. NO. 94-1487, at 9-10, *reprinted in* 1976 U.S.C.C.A.N. at 6608. For a comprehensive explanation of the legislative process leading to the enactment of the FSIA, see Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View*, 35 INT’L & COMP. L.Q. 302, 304 (1986).

60. 28 U.S.C. § 1602 (1994).

61. H.R. REP. NO. 94-1487, at 6, *reprinted in* 1976 U.S.C.C.A.N. at 6604. The general purpose of the FSIA was to “assure that American citizens [were] not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions” 1976 *Hearings*, *supra* note 11, at 24 (testimony of Monroe Leigh, Legal Adviser, Department of State).

62. See H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. American citizens had recently begun coming into contact with foreign state entities and it had become “clear that our judicial system requires comprehensive standards on when and how a citizen can maintain a lawsuit against a foreign state or its entities and when a foreign state is entitled to sovereign immunity.” *Id.* “The specific applications of [the restrictive] principle of international law are codified in [the FSIA].” 1976 *Hearings*, *supra* note 11, at 25 (testimony of Monroe Leigh, Legal Adviser, Department of State).

63. See H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606. “In virtually every other country in the world, sovereign immunity is a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs.” 1976 *Hearings*, *supra* note 11, at 27 (testimony of Monroe Leigh, Legal Adviser, Department of State).

64. See H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606; see also Hoffman, *supra* note 15, at 536.

65. See H.R. REP. NO. 94-1487, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 6606. Up until the passage of the FSIA, even in those cases where foreign corporations were

States plaintiffs, who were increasingly interacting with foreign states and corporations owned by foreign states.⁶⁶ When signing the FSIA into law, President Gerald Ford stated:

This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.⁶⁷

2. How the FSIA Is Intended to Work

Congress intended the FSIA to be the sole basis upon which courts decide all issues of foreign immunity, preempting all state and federal law, except international treaties.⁶⁸ Under the FSIA, foreign states,⁶⁹ their political subdivisions,⁷⁰ as well as their agencies or instrumentalities,⁷¹ are immune from suit in the United States unless the act that forms the basis of the suit falls within one of the FSIA's exceptions, the major exception being for commercial acts.⁷²

For example, if a United States citizen⁷³ wants to bring an ac-

subject to suit, American law provided no procedural means for an execution of judgment. *See* Dorsey, *supra* note 9, at 260.

66. *See* 28 U.S.C. § 1602 (1994); H.R. REP. NO. 94-1487, at 6-7, *reprinted in* 1976 U.S.C.C.A.N. at 6605; Hoffman, *supra* note 15, at 536.

67. PUBLIC PAPERS OF THE PRESIDENTS, GERALD R. FORD, 1976-77, BOOK III 2610 (1979).

68. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); *see also* H.R. REP. NO. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6610; Hoffman, *supra* note 15, at 261.

69. The State Department still decides the question of which governments are recognized as foreign states.

70. Congress intended "political subdivisions" to mean all governmental units beneath the central government. *See* H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6613.

71. Congress required three criteria for an entity to be termed an "agency or instrumentality" within the FSIA: (1) that it be a separate legal person, i.e., have its own corporate identity; (2) that it be either an organ of a foreign state or a foreign state's political subdivision, or have a majority of ownership interests owned by a foreign state or foreign state's political subdivision; and (3) that it not be a citizen of the United States. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

72. *See* 28 U.S.C. § 1605 (1994). In addition to the commercial activity exception, a foreign state is not immune from suit when it has waived its immunity, when the plaintiff alleges injury in violation of international law, when the plaintiff seeks money damages for personal injury or death, or when the plaintiff sues to enforce a maritime lien. *See id.*

73. Although the FSIA was clearly intended to provide American citizens with a

tion against a foreign corporation for breach of contract, the foreign corporation may assert sovereign immunity as an affirmative defense, claiming that it constitutes a foreign state as defined in the FSIA.⁷⁴ If the foreign corporation provides *prima facie* evidence that it qualifies as a foreign state under the FSIA, because it is an agency or instrumentality of the state, the burden shifts to the plaintiff to show that the acts being sued on fall within one of the exceptions to immunity set forth in the statute, for example, the commercial activities exception.⁷⁵ If the plaintiff fails to sustain this burden, the foreign entity receives absolute immunity.⁷⁶

If the plaintiff successfully meets the burden of proof that the defendant's acts fall within a statutory exception, the defendant foreign entity then may prove that the exception does not apply.⁷⁷ If the foreign defendant is successful, the court must grant absolute immunity. If the court finds that the commercial exception applies, as is usually the case with foreign-government-owned corporations, the defendant corporation must defend itself in court.⁷⁸ Even when the defendant corporation is not granted immunity, however, certain benefits automatically adhere to the foreign entity because of its qualification as a foreign state under the FSIA.⁷⁹

3. Benefits Accorded a Foreign State Under the FSIA

The FSIA grants many procedural benefits to any entity, commercial or not, that qualifies as a foreign state.⁸⁰ First, the foreign

procedure to sue foreign states, the statute does not require that the plaintiff be an American citizen. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 490 (1983).

74. Sovereign immunity is an affirmative defense that must be specifically pleaded. See H.R. REP. NO. 94-1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6616. For a complete discussion of the procedural aspects of raising and proving sovereign immunity within the FSIA, see Kane, *supra* note 43, at 414-21.

75. See H.R. REP. NO. 94-1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6616; Kane, *supra* note 43, at 421. In the case of a foreign corporation, by far the most used exception is the commercial activities exception.

76. See H.R. REP. NO. 94-1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6616; Kane, *supra* note 43, at 421.

77. The FSIA thus codifies restrictive immunity by granting foreign states, their political subdivisions, and their agencies and instrumentalities a presumption of governmental purpose, which is then taken away if the court finds a commercial activity. Foreign-government-owned corporations routinely fail to escape the commercial activities exception. See Rebecca J. Simmons, *Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act*, 90 COLUM. L. REV. 2278, 2280, 2288 (1990).

78. See *id.* at 2282-88 (providing an explanation of how courts have interpreted the commercial activities exception).

79. See Hoffman, *supra* note 15, at 571.

80. See *id.* (discussing the procedural benefits enjoyed by foreign corporations

defendant may remove the action from state to federal court, thereby circumventing the plaintiff's traditional right to choice of venue.⁸¹ Second, the plaintiff loses the right to a jury trial.⁸² Third, the plaintiff must adhere to service of process requirements as detailed in the FSIA, which if not followed may result in a dismissal of the action.⁸³ Fourth, the FSIA does not allow for *in rem* attachment of property of a defendant that is within the FSIA's protection.⁸⁴ Finally, when the foreign defendant is actually a government or political subdivision, not an agency or instrumentality, the plaintiff loses the right to punitive damages.⁸⁵

In the case of a foreign-government-owned corporation, the key to obtaining these benefits is to fit within the FSIA's definition of "foreign state." Section 1603(a) defines a "foreign state" as follows: "A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."⁸⁶

that qualify under the FSIA and the substantive rights of the plaintiff which are lost as a result).

81. See 28 U.S.C. § 1391(f) (1994).

82. See *id.* § 1330. The automatic loss of the plaintiff's Seventh Amendment right to a jury trial has been the subject of numerous law review articles claiming that, in this respect, the FSIA might be unconstitutional. See Abir, *supra* note 9; Kimberly K. Hill, Note, *Foreign Government-Owned Corporations, the Foreign Sovereign Immunities Act, and the Right to Jury Trial*, 1982 DUKE L.J. 1071.

83. Section 1608(b) provides different rules for service of process depending on whether the defendant is a foreign state or an agency or instrumentality of a foreign state. See 28 U.S.C. § 1608(b). Thus, the plaintiff must first anticipate that the defendant will claim immunity and then accurately predict whether the defendant will qualify as a foreign state or an agency or instrumentality, or risk losing his or her claim altogether.

84. See *id.* § 1609. Consequently, if a plaintiff does not attach the defendant's property, and later finds that the defendant is not within the FSIA, the plaintiff may lose the ability to procure an *in rem* attachment, because the defendant has removed the property. Alternatively, if a plaintiff, unaware that the defendant is a foreign state, does attach the defendant's property, but later discovers that the defendant is within the FSIA, the plaintiff finds that the property is now immune from attachment. See *id.*; Hoffman, *supra* note 15, at 573-74.

85. See 28 U.S.C. § 1606. Punitive damages, however, are allowed when the entity being sued is an agency or instrumentality of a foreign state, as would be the case with any foreign-owned-corporation. See *id.*

86. *Id.* § 1603(a). Congress elaborated on the text of section 1603(a), explaining that the term "foreign state" as used in every other section of the Act, except section 1608, includes "not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state." H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

Section 1608 contains service of process provisions which differ depending on whether the entity is a foreign state or political subdivision as compared to an agency or instrumentality. See 28 U.S.C. § 1608.

The FSIA's definition of foreign state thus explicitly includes entities which are "agencies or instrumentalities of a foreign state." Section 1603(b) defines "agencies and instrumentalities" as follows:

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.⁸⁷

A crucial issue for foreign-government-owned corporations, and the first issue a court must address in a suit involving such a corporation, is whether the defendant corporation satisfies the FSIA's definition of agency and instrumentality.

4. Majority Owned by a Foreign State Requirement of Section 1603(b)(2)

By definition, when a foreign corporation is directly majority owned by a foreign state, it is granted the FSIA's protection.⁸⁸ Frequently, however, a corporation is not directly majority owned by a foreign state, but is instead majority owned by another corporation which, in turn, is directly majority owned by a foreign state, through a hierarchical system of ownership.⁸⁹ This corporate structure, re-

Congress further explained the second criterion, stating that "the entity [must] be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision)." H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

87. 28 U.S.C. § 1603(b) (1994).

88. Congress elaborated on the majority requirement, explaining that where "entities are entirely owned by a foreign state, they would of course be included within the definition." H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614. However, "[w]here ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

89. See BLUMBERG, *supra* note 1, at 100; see also Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 *FORDHAM L. REV.* 227, 227-28, 228 n.8 (1990) (providing a general explanation of the parent/subsidiary relationship; stating that ben-

ferred to by the courts as “tiering,” has become common in recent years, as a greater number of foreign governments become involved in commercial pursuits.⁹⁰ When an action is brought by a United States plaintiff against such a corporation, in which a foreign government maintains a controlling interest through one or more intermediate corporations, the defendant corporation typically claims to be a foreign state within the definition of the FSIA.

The issue courts face in these instances is whether tiering of ownership interests is permissible under the FSIA, thereby affording the defendant foreign corporate subsidiary the benefits accorded to all “foreign states” by the FSIA.

II. JUDICIAL TREATMENT OF TIERING UNDER THE FSIA

A. Tiering—*The First Twenty Years*

1. Courts Routinely Allow Tiering

In early cases under the FSIA, courts uniformly held that corporations not directly owned by a foreign state but with indirect ties to a foreign state through a “tiered” corporate structure fell within the protection of the FSIA.⁹¹ Courts simply looked to the percentage of indirect ownership that could be attributed to the foreign state, and if it was over 50 percent, found the defendant corporation within the FSIA.⁹²

efits in this hierarchical corporate arrangement lie in its use as a tool for limited liability and choice of law, as well as for tax planning).

90. See BLUMBERG, *supra* note 1, at 8; see also Matthew D. Riven, Comment, *The Attempted Takeover of LTV by Thomson: Should the United States Regulate Inward Investment by Foreign State-Owned Enterprises?*, 7 EMORY INT’L L. REV. 759, 768-74 (1993) (providing reasons for the large number of state-owned industries in Europe, industries that in the United States remain privately owned). In the last few decades, Western European nations have invested heavily in industry, especially in fields of high-technology. See *id.* at 768. Governments see strong national technology as a sign of prestige and believe that an infusion of state capital is the best way to develop this technology. See *id.* at 773-74 (citing HANS MORGENTHAU, *POLITICS AMONG NATIONS* 94-95 (2d ed. 1954)). “If the technological venture is successful, the government will reap not only prestige, but also a commercial profit.” *Id.* at 774.

91. See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Trump Taj Mahal Assocs. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 958 F.2d 365 (3d Cir. 1992); *O’Connell Mach. Co. v. M.V. “Americana”*, 734 F.2d 115 (2d Cir. 1984).

92. Courts allowing tiering have usually accepted the defendant corporation’s affidavit with no questions. See, e.g., *O’Connell Mach. Co. v. M.V. “Americana”*, 566 F. Supp. 1381, 1384 (S.D.N.Y. 1983), *aff’d*, 734 F.2d 115 (2d Cir. 1984). Because plaintiffs rarely challenged a court’s finding of majority ownership, the issue of whether the FSIA permits tiering was not analyzed by a federal court of appeals until *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

In *O'Connell Machinery Co. v. M.V. "Americana,"*⁹³ the United States Court of Appeals for the Second Circuit found that the FSIA applied to an Italian shipping line in a tiered corporate structure, because its parent corporation, FINMARE, was so linked to the Italian government that it qualified as a political subdivision.⁹⁴ The Second Circuit held that because FINMARE was a political subdivision of Italy, and the majority of shares in the defendant shipping line were under the direct control of FINMARE, then the defendant shipping line clearly qualified as an agency or instrumentality under the FSIA.⁹⁵ The court stated "[t]he fact that the Italian Government saw fit to double-tier its administrative agencies did not compel a holding to the contrary."⁹⁶

Later courts used *O'Connell* to hold that indirectly held majority ownership interests by themselves were sufficient to qualify an entity for inclusion within the FSIA as an agency or instrumentality.⁹⁷ These courts interpreted section 1603(b) as requiring only that the defendant corporation be majority controlled by a foreign state, regardless of whether the foreign state actually held owner-

93. 734 F.2d 115 (2d Cir. 1984).

94. *See id.* at 116-17. FINMARE was an Italian government-owned corporation charged with coordinating the government's commercial enterprises. *See id.* at 116.

95. *See id.* at 116. *See supra* Part I.C.3 for the text of section 1603(b)(2) of the FSIA, which allows an entity to qualify for agency or instrumentality status because it is majority owned by a foreign political subdivision.

96. *O'Connell*, 734 F.2d at 116. This language has often been interpreted by courts as authority to allow tiering when the parent corporation is an agency or instrumentality. *See infra* note 96. Interestingly, in *O'Connell*, the district court for the Southern District of New York had found that the defendant corporation qualified under the FSIA because of its indirect ownership by Italy. *See O'Connell*, 566 F. Supp. at 1385. The district court categorically rejected the plaintiff's argument that the defendant corporation should not be considered a "foreign state" within the FSIA because the indirectly tiered ownership made the defendant too remote from governmental control. *See id.* Instead, the district court reasoned that the requirement of section 1603(b)(1) that an agency or instrumentality have a separate legal identity showed congressional intent that "'corporate form'—in and of itself—be immaterial to the relevant determination." *Id.* On appeal, however, while affirming the district court's finding of agency within the FSIA, the Second Circuit made clear that the finding was based not on indirect ownership by Italy, but the fact that the parent corporation was a political subdivision of Italy. *See O'Connell*, 734 F.2d at 116-17. "According to the legislative history of the FSIA, political subdivisions were intended to include 'all governmental units beneath the central government.' FINMARE fits comfortably within this definition." *Id.* (citing H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613).

97. *See, e.g.,* *Talbot v. Saipem A.G.*, 835 F. Supp 352 (S.D. Tex. 1993); *Trump Taj Mahal Assocs. v. Construzioni Aeronautiche Giovanni Aguste S.p.A.*, 761 F. Supp 1143 (D.N.J. 1991), *aff'd without opinion*, 958 F.2d 365 (3d Cir. 1992); *New York Bay Co. v. State Bank*, No. 93-Civ-6075, 1994 WL 369406 (S.D.N.Y. July 12, 1994); *Rutkowski v. Occidental Chem. Corp.*, No. 83-C-2339, 1988 WL 107342 (N.D. Ill. Oct. 5, 1988).

ship shares in the defendant corporation.⁹⁸ These courts often cited *O'Connell* in holding that the form of ownership should not defeat the broad congressional intent of including foreign corporations that are owned, directly or indirectly, by a foreign state.⁹⁹ Courts examining this issue noted "that . . . ownership interest is . . . 'indirect' . . . is immaterial,"¹⁰⁰ and "we focus on substance rather than the corporate form."¹⁰¹ Thus, in the first two decades of interpreting the FSIA, courts allowed "tiering" of indirect ownership.

2. Courts Move Away from Tiering

In 1993, the Court of Appeals for the Third Circuit, in *Federal Insurance Co. v. Richard I. Rubin & Co.*,¹⁰² hinted in dicta that "tiering" might not actually be allowed under the FSIA. In *Rubin*, the district court, citing *O'Connell*, found that the defendant corporation qualified as an agency or instrumentality under the FSIA because its parent corporation was an agency or instrumentality of the Dutch government.¹⁰³ Although FSIA application was not at issue in this case, the Third Circuit specifically noted that a corporation might not qualify as an agency under the FSIA merely because it is majority owned by an entity which does qualify as an agency under the FSIA.¹⁰⁴

98. See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993). In *Allendale*, the defendant Zenith Corporation was easily found to be within the FSIA because its parent company was majority owned by the French government. In an unusual twist, the court's finding of agency within the FSIA benefitted the plaintiffs by providing the court jurisdiction over a case involving a warehouse fire in France. The court found that the defendant fell within the commercial exception, and the plaintiffs were able to bring a suit that otherwise would have been lost to the French courts. See *id.* at 427-28.

99. See, e.g., *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318 n.5 (1995) ("The fact that Israel's ownership interest in Dead Sea is 'indirect' . . . is immaterial."); *Talbot v. Saipem A.G.*, 835 F. Supp. 352, 353 n.2 (S.D. Tex. 1993) (holding "[t]hat Saipem's ownership by the Italian government is indirect is immaterial" (citations omitted)); *Rutowski*, 1988 WL 107342, at *1. ("[T]here is no question that, by holding majority positions, Quebec controlled each of the corporations down this chain. Because we focus on substance rather than the corporate form employed by Canada, we hold that ACL is an 'instrumentality' of Canada." (citations omitted)).

100. *Delgado*, 890 F. Supp. at 1318 n.5.

101. *Rutowski*, 1988 WL 107342, at *1.

102. 12 F.3d 1270 (3d Cir. 1993).

103. See *Federal Ins. Co. v. Richard I. Rubin & Co.*, No. 92-4177, 1993 WL 21327, at *3 (E.D. Pa. Jan. 26, 1993), *rev'd*, 12 F.3d 1270 (3d Cir. 1993).

104. See *Federal Ins. Co.*, 12 F.3d at 1285 n.12 (specifically attributing the reasoning only to Judge Greenberg). The court used the text of section 1603(b) to show Judge Greenberg's reasoning that to qualify as an agency of a foreign state, the defendant corporation must be majority owned by a foreign state, not another agency. See *id.*

Not all courts had such reservations. In *Linton v. Airbus Industrie*,¹⁰⁵ the Court of Appeals for the Fifth Circuit noted, again in dicta, that indirect ownership by a foreign state should be allowed under the FSIA.¹⁰⁶ The court stated the following:

The controlling statute . . . erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the entity claiming immunity—not its parent—have ‘a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof.’ There is no mention of ‘voting’ or ‘control’ majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.¹⁰⁷

The contrasting views of the Third and Fifth Circuit Courts of Appeal foreshadowed a clear division of opinion on this issue.

B. *The Circuits Divide*

In recent years, the Courts of Appeals for the Seventh and Ninth Circuits have split over the proper interpretation of the requirements of section 1603(b) of the FSIA in cases where the foreign corporation defendant is not directly majority owned by a foreign state.¹⁰⁸ Conflicting interpretations of sections 1603(a) and (b) resulted in the Ninth Circuit requiring direct ownership by the foreign state, and the Seventh Circuit allowing indirect ownership through tiers of intermediate owners, as long as a majority of shares can eventually be traced back to the foreign state.¹⁰⁹

1. The Ninth Circuit—No Tiering Allowed

In *Gates v. Victor Fine Foods*,¹¹⁰ a California pork processing plant, Golden Gate Fresh Foods (“GGFF”), which went by the trade name of Victor Fine Foods, abruptly closed down the company and terminated its employees without notice, in violation of

105. 30 F.3d 592 (5th Cir. 1994).

106. *See id.* at 598 n.29. “Tiering” had not been allowed by the district court but the issue had not been raised on appeal. *See Linton v. Airbus Industrie*, 794 F. Supp. 650, 653-54 (S.D. Tex. 1992) (holding that tiering was not allowed because one of the parent corporations was not majority owned by a foreign state). *See infra* note 142 for a discussion of the related “pooling” issue, which was the primary issue of this case.

107. *Linton*, 30 F.3d at 598 n.29 (citation omitted).

108. *See In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

109. The Supreme Court has never dealt with the issue of tiering under section 1603(b). *See Hoffman, supra* note 15, at 547 n.66.

110. 54 F.3d 1457 (9th Cir. 1995).

several U.S. labor laws.¹¹¹ GGFF employees brought suit against GGFF, its parent company Fletcher Fine Foods (“FFF”), a Canadian corporation, and the parent company of FFF, Alberta Pork Producers. Alberta Pork Producers was a Canadian marketing agent set up by the Canadian government.¹¹²

Alberta Pork and FFF moved to dismiss the action, alleging that they qualified for foreign immunity under the FSIA.¹¹³ In denying the motion to dismiss, the District Court for the Eastern District of Louisiana assumed that the FSIA protected the two companies, but that they were not completely immune from suit because their actions fell within the commercial activities exception.¹¹⁴ The defendants appealed.

GGFF employees claimed that Alberta Pork and FFF were not “foreign states” as defined in the FSIA, and therefore were not entitled to FSIA protection.¹¹⁵ The two defendants claimed both that they were “foreign states” within the FSIA, and that they carried out the work of the Canadian government, and thus did not fall within the commercial exception.¹¹⁶ The court held that Alberta Pork, as a marketing board created and closely supervised by the Alberta Agricultural Products Marketing Council, a governmental unit, was an organ of the Canadian government, and thus, by definition, clearly qualified as an agency under section 1603(b).¹¹⁷ However, in regard to Alberta Pork’s subsidiary, FFF, now considered to be owned by an agency, the court faced the issue of whether

111. *See id.* at 1459.

112. *See id.* Alberta Pork was established pursuant to the Alberta Marketing of Agricultural Products Act, under which all hog producers in Alberta must sell their hogs to Alberta Pork. Alberta Pork would then sell the hogs to pork processors in Canada and abroad, including the United States. Under the Canadian act, Alberta Pork was authorized to buy businesses such as FFF. *See id.* at 1460-61.

113. *See id.* at 1459.

114. *See id.* *See supra* Part I.C.2 for a discussion of the exceptions to absolute immunity allowed under 28 U.S.C. § 1605.

115. *See Gates*, 54 F.3d at 1459-60.

116. *See id.*

117. *See id.* at 1460-61. The GGFF employees argued that Alberta Pork could not be an organ of Canada because of the presumption of independence that traditionally has been accorded to agencies of a foreign state. However, the court noted that the issue of whether a particular entity was an agency or instrumentality of a foreign state for purposes of the FSIA was completely different from the issue of whether a particular entity was an agency or instrumentality for purposes of traditional agency law. *See id.* at 1460 n.1. “The use of the single term ‘agency’ for two purposes . . . may cause some confusion.” *Id.* (quoting *Hester Int’l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 177 n.5 (5th Cir. 1989)).

section 1603(b) allowed tiering.¹¹⁸

The court first examined the text of section 1603(b).¹¹⁹ It found that the literal language of the statute required that to be an agency or instrumentality of a foreign state, an entity must either be an organ of a foreign state or have a majority of its shares owned by a foreign state or a political subdivision.¹²⁰ Thus, the court reasoned, because an ordinary pork processing plant could not be considered an organ of a foreign state, FFF could only be an agency or instrumentality if a majority of its shares were owned by a foreign state or political subdivision.¹²¹

The court rejected the defendant's argument that Alberta Pork, as an agency or instrumentality under section 1603(b), became a foreign state under section 1603(a), thereby making FFF an agency or instrumentality under section 1603(b) because it was majority owned by a foreign state.¹²² First, the court examined the text of section 1603(b). The court reasoned that the statute provides that a foreign state "includes" an agency or instrumentality, not that it "is defined as" an agency or instrumentality.¹²³ The court noted that if Congress had intended an "agency or instrumentality" to literally be substituted for "foreign state" in the statute, the term "political subdivision" would likewise have to be substituted for "foreign state."¹²⁴ It recognized that the statutory language directly contradicts this reading because the remainder of the section draws a distinction between "foreign states" and "political subdivisions."¹²⁵ Therefore, the court concluded that the clear language of the statute indicates that Congress did not intend such an interpretation.¹²⁶

The Ninth Circuit then examined the legislative history and

118. *See id.* at 1460.

119. *See supra* Part I.C.3 for the complete text of section 1603(b).

120. *See Gates*, 54 F.3d at 1461.

121. *See id.* at 1461-62.

122. *See id.* at 1462.

123. *Id.*

124. *See id.* Section 1603(a) defines a foreign state as including both a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (1994).

125. *See Gates*, 54 F.3d at 1462. For example, the court pointed out that section 1603(b)(2) states that an agency or instrumentality is an entity "majority owned by a foreign state or political subdivision." The court reasoned that if section 1603(a) was meant to apply to section 1603(b)(2), then the statute would literally have to be read as "majority owned by a foreign state or political subdivision or agency or instrumentality or political subdivision." *Id.*

126. *See id.*

found that it supported the court's interpretation of the text.¹²⁷ Congress stated that an entity falling within the FSIA is required to be either an organ of a foreign state (or a foreign state's political subdivision), or that a majority of the entities' shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision).¹²⁸ The court reasoned that Congress seemed particularly aware of the differences between foreign states and political subdivisions, as well as between agencies or instrumentalities and political subdivisions. Therefore, Congress could easily have stated in the text of the statute that agencies could also be majority owned by other agencies if it so intended.¹²⁹ The court concluded "[i]t did not."¹³⁰

The Ninth Circuit further justified its decision by explaining that the broad implications of holding that entities majority owned by agencies become agencies within the FSIA made it "reluctan[t] to put words in Congress' mouth."¹³¹ The court reasoned that the FSIA already provides potential immunity to foreign states, organs and political subdivisions of foreign states, and agencies or instrumentalities of foreign states or political subdivisions.¹³² It stated the following:

To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.¹³³

The court explained that while extending sovereign immunity to subsidiary corporations might be a desirable policy, it had no power to do so when a careful reading of the statute plainly disallowed it.¹³⁴

127. See H.R. REP. NO. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

128. See *Gates*, 54 F.3d at 1462. "[T]he entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." *Id.* (citing H.R. REP. NO. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. at 6614).

129. See *id.* at 1462.

130. *Id.*

131. *Id.*

132. See *id.*

133. *Id.*

134. See *id.* "[W]e cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion." *Id.* Although no other

2. The Court of Appeals for the Seventh Circuit Allows Tiering

In *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*¹³⁵ ("Roselawn"), the Court of Appeals for the Seventh Circuit addressed the issue of tiering. American Eagle Flight 4184, from Indianapolis to Chicago, had crashed in its approach to O'Hare Airport, killing all sixty-eight people aboard.¹³⁶ Estates and families of deceased passengers brought suits in state courts against the airline, and the aircraft manufacturer, Avions de Transport Regional, G.I.E. ("ATR").

ATR, the product of an international joint venture, was directly owned fifty percent by a French corporation and fifty percent by an Italian corporation.¹³⁷ ATR claimed foreign state status under the FSIA, arguing that indirectly, through a complicated tiered ownership arrangement, it had approximately 62 percent combined ownership by France and Italy.¹³⁸ The district court allowed ATR to remove and consolidate all of the cases in federal court pursuant to section 1441 of the FSIA.¹³⁹ The plaintiffs, deprived of a forum in their home state as well as a jury trial,¹⁴⁰

court of appeals has followed the reasoning of the *Gates* court on the issue of tiering, three district courts have followed the *Gates* reasoning. See *Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, Civ.A.No. 96-5217, 1997 WL 539763 (E.D. Pa. Aug. 11, 1997) (following *Gates* reasoning in holding that New Zealand fishing commissions were not immune from suit because they were not owned by New Zealand, but only by an agency or instrumentality of New Zealand); *Martinez v. Dow Chem. Co.*, Civ.A.Nos. 95-3212, 95-3214, 1996 WL 502461 (E.D. La. Sept. 4, 1996) (finding that an Israeli corporation, indirectly owned by Israel through three layers of corporate subsidiaries, was not an agency under the FSIA); *Gardner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995) (finding that an Argentine airline was not an agency under the FSIA when a majority of its shares were owned by Iberia airline, which was owned by Spain); cf. *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. The M/T Respect*, 89 F.3d 650 (9th Cir. 1996) (upholding *Gates* decision that tiering is not permitted, but holding that a foreign refinery was an agency within the FSIA because it was an organ of the Mexican government, thereby distinguishing *Gates* on its facts). But see *Millicom Int'l Cellular S.A. v. Republic of Costa Rica*, Nos. Civ.A. 96-314(RMU), 1998 WL 84601, at *9 n.5 (D.D.C. Feb. 23, 1998) (finding a corporate subsidiary to be an agency within the FSIA because it is majority owned by another agency and negatively citing *Gates*).

135. 96 F.3d 932 (7th Cir. 1996).

136. See *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 909 F. Supp. 1083, 1086 (N.D. Ill. 1995), *aff'd*, 96 F.3d 932 (7th Cir. 1996).

137. See *Roselawn*, 96 F.3d at 935.

138. See *id.* app. A. at 948.

139. See *id.* at 936. 28 U.S.C. § 1441 permits removal of a civil action brought in state court against a foreign state as defined by section 1603(a).

140. See *supra* Part I.C.3 for a discussion of benefits afforded by the FSIA. A principal argument raised by the plaintiffs was that the FSIA deprived them of their

moved to remand on the grounds that ATR was not a foreign state under the FSIA.¹⁴¹ The plaintiffs argued that ATR, owned by corporate intermediaries that were “agencies or instrumentalities” of a foreign state, could not itself claim to be an agency or instrumentality because, under *Gates*, the FSIA prohibits tiering.¹⁴² The Seventh Circuit did not agree¹⁴³ and found that ATR was an agency under the FSIA because it was controlled by France, albeit indirectly, through intervening agencies.¹⁴⁴

The *Roselawn* court directly criticized the *Gates* court for its narrow reading of the statute.¹⁴⁵ The *Roselawn* court found that the plain language of section 1603(a) defines the term foreign state broadly to include political subdivisions and agencies or instrumentalities.¹⁴⁶ The court found that Congress clearly intended that section 1603(a)’s broad definition of foreign state be applied to all sections of the FSIA, except section 1608, when it refers to “foreign sovereign.”¹⁴⁷ The court observed that “[t]o limit ‘foreign state’ [in section 1603(b)] to ‘foreign sovereign’ or ‘foreign government’

Seventh Amendment right to a jury trial. See *Roselawn*, 96 F.3d at 943-47; Committee on Int’l Litigation, New York State Bar Assoc., *Foreign State Defendant’s Right to Trial by Jury Under the Foreign Sovereign Immunities Act*, 26 TEX. INT’L L.J. 71 (1991) (presenting an overview of the arguments for and against jury trials under the FSIA).

141. See *Roselawn*, 96 F.3d at 936.

142. See *id.* at 939. The plaintiffs presented an additional argument why ATR could not be considered an agency under section 1603(b). Because ATR was only 50 percent owned by each of France and Italy, it was not majority owned by either. Thus, ATR could not be considered majority owned by a foreign state, but by foreign *states*. However, “pooling,” or adding together minority interests of different foreign states to create a majority of foreign ownership was, and continues to be, routinely accepted by courts. See, e.g., *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994). The *Roselawn* court was no different. See *Roselawn*, 96 F.3d at 937-39.

143. See *Roselawn*, 96 F.3d at 941.

144. See *id.* To date, no other federal court of appeals and only one district court has followed the *Roselawn* decision. See *Millicom Int’l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998) (citing *Roselawn* in holding that a corporate subsidiary of an agency of Costa Rica is also an agency within the FSIA); cf. *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (holding that a foreign refining company was an agency within the FSIA, not because it was indirectly owned by Mexico, but on the alternate ground that it was an organ of the Mexican government).

145. See *Roselawn*, 96 F.3d at 941.

146. See *id.* at 940.

147. See *id.* See *supra* note 86 for an explanation of the relevant portion of section 1608. The court further pointed out that Congress’ awareness of the difference between the broadly defined concept of a foreign state and the traditional concept of a foreign government is also evident in 28 U.S.C. § 1611(b), where the text reads “the property of a foreign *state* shall be immune from attachment and from execution, if— (1) the property is that of . . . its parent foreign *government*” *Roselawn*, 96 F.3d at 940 (quoting 28 U.S.C. § 1611(b) (1994)) (alterations in original) (emphasis added).

would be to rewrite the Act, which is obviously beyond our role as judges.”¹⁴⁸

The plaintiffs argued that to broadly include “agencies or instrumentalities” in the term “foreign state” in section 1603(b) necessitates the inclusion also of the term “political subdivision.” Section 1603(b)’s relevant language then becomes “majority of whose shares . . . is owned by a foreign state (or agency or instrumentality or political subdivision) or political subdivision.”¹⁴⁹ In response, the *Roselawn* court stated that even if the reading of that section were superfluous, the court could not alter the proper reading of the entire FSIA as intended by Congress.¹⁵⁰

In further support of its position, the court cited Congress’ inclusion of transport organizations and airlines (such as ATR) among many possible forms that instrumentalities could take.¹⁵¹ The court stated that Congress clearly intended the FSIA to include entities exactly like the defendant ATR.¹⁵² Ultimately, the *Rose-*

148. *Roselawn*, 96 F.3d at 940.

149. The *Gates* court noted that this interpretation of the text made the reading of section 1603(b) superfluous. See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995). See *supra* note 125 for a discussion of this argument presented by the *Gates* court.

150. See *Roselawn*, 96 F.3d at 940.

151. See *id.* The House Report listed examples of corporations that might fall within the FSIA, “including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.” H.R. REP. NO. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

152. See *Roselawn*, 96 F.3d at 940-41. In further support of its position, the *Roselawn* court cited other Seventh Circuit decisions in which corporations with indirect foreign ownership were considered agencies within the FSIA. See *id.* at 941 (citing *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 427 (7th Cir. 1993) (holding that two Zenith companies were agencies when 100 percent owned by corporations 90 percent owned by France); *State Bank v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986) (finding that a bank was an agency when 92 percent owned by Reserve Bank of India, which was wholly owned by India); *Alberti v. Impresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (stating that a nationalized meat packing corporation operated through an agent of the Nicaraguan government was a foreign state within the FSIA)). In addition, the *Roselawn* court noted several federal decisions that it stated have allowed tiered ownership interests to count for ownership under the FSIA. See *Roselawn*, 96 F.3d at 941 (citing *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995) (treating a corporation wholly owned by another corporation in turn owned by a political subdivision of Canada as an instrumentality of a foreign state); *Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994) (considering a wholly owned subsidiary of a corporation wholly owned by political subdivision as an instrumentality of a foreign state); *American W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795-96 (9th Cir. 1989) (accepting that a wholly owned subsidiary of a national airline wholly owned by Ireland was within the FSIA); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C.

lawn court concluded that because the FSIA does not expressly require direct ownership and does not expressly exclude subsidiary corporate arrangements, tiering is allowed.¹⁵³ It stated the following:

[S]o long as the corporate intermediaries standing between a foreign state and a defendant seeking to invoke foreign-state status are themselves majority-owned by a statutorily-defined “foreign state” (which, to be explicit, includes an agency or instrumentality of a foreign state), such tiering of ownership interests will not deprive the defendant of foreign state status.¹⁵⁴

C. *United States District Court for the Southern District of New York Offers a New Analysis*

Most recently, in the case of *Hyatt Corp. v. Stanton*,¹⁵⁵ the United States District Court for the Southern District of New York rejected the reasoning of both the Ninth and the Seventh Circuits and offered a new analysis of the issue of tiering.

Hyatt Corporation (“Hyatt”) sued the vice-president of a Finnish bank, Skopbank, in New York State Supreme Court on breach of contract and tort claims relating to a defaulted loan.¹⁵⁶ Skopbank was majority owned by the Finnish Government Guarantee Fund (“GGF”). GGF, in turn, was majority owned by the Finnish Government. The vice-president, Stanton, removed the action to the District Court for the Southern District of New York, claiming that Skopbank was a foreign state under the FSIA, and that he, as an employee of Skopbank, was also a foreign state within the meaning of the FSIA.¹⁵⁷ Hyatt moved to remand, arguing that

Cir. 1982) (finding that a wholly owned subsidiary of a nationalized Irish corporation could be considered an instrumentality of Ireland, so that the district court’s dismissal was improper)).

153. See *Roselawn*, 96 F.3d at 941.

154. *Id.* at 939 (quoting *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 909 F. Supp. 1083, 1094 (N.D. Ill. 1995), *aff’d*, 96 F.3d 932 (7th Cir. 1996)).

155. 945 F. Supp. 675 (S.D.N.Y. 1996).

156. See *id.* at 677-78. Skopbank loaned \$100 million dollars to Great Cruz Bay Development Company to build a resort hotel and condominium project on St. John. When Great Cruz defaulted, the loan was restructured, with Hyatt Corporation becoming the manager of the hotel. In 1991, Skopbank foreclosed against Great Cruz, and the resort was sold at auction to 35 Acres Associates, claimed by Hyatt to be a subsidiary of Skopbank. Subsequently, 35 Acres terminated its management contract with Hyatt. In its suit, Hyatt claimed that Stanton directed the foreclosure, sale, and termination of Hyatt’s contract for his own and Skopbank’s personal gain. See *id.* at 678.

157. See *id.* In order to qualify as a foreign state under the Act, Stanton needed to show both that his employer, Skopbank, was a foreign state and that he was acting in

Skopbank could not be considered an agency or instrumentality because the FSIA specifically excludes entities that are majority owned by an agency or instrumentality of a foreign state.¹⁵⁸ The district court, though agreeing with the result in *Gates*, disagreed with the reasoning of both the Ninth and the Seventh Circuits.

In *Hyatt*, the court found neither the Seventh nor Ninth Circuit's reasoning persuasive, stating that section 1603(b)'s proper interpretation cannot be found in either the text or the legislative history.¹⁵⁹

Before the court could begin its analysis of the proper interpretation of section 1603(b)(2), it faced a threshold issue of whether, as Skopbank claimed, GGF, its owner, was a political subdivision of Finland.¹⁶⁰ After an extensive analysis that involved distinguishing the Second Circuit decision in *O'Connell Machinery Co. v. M.V. "Americana,"*¹⁶¹ the *Hyatt* court found that GGF was not a political subdivision, but an agency or instrumentality of the Finnish Government.¹⁶² Thus, the court had to decide whether the FSIA in-

his official capacity when he committed the acts upon which he was being sued. *See id.* at 679 (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990)).

158. *See id.* at 680.

159. *See id.* at 688.

160. *See id.* at 680. If the court had agreed, then clearly Skopbank would have been an agency or instrumentality under the plain language of section 1603(b).

161. 734 F.2d 115 (2d Cir. 1984). *See supra* Part II.A.1 for a discussion of *O'Connell*.

162. *See Hyatt*, 945 F. Supp. at 685. The *Hyatt* court recognized that a split existed among courts as to the proper test to use in determining whether an entity is a "political subdivision" or an "agency or instrumentality" under the FSIA. *See id.* at 680-85. Some courts, including *O'Connell*, have applied a "core function" test, which finds that an entity is a political subdivision if the central role is governmental in nature, and an agency or instrumentality if the central role is commercial. *See Transaero Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994). Other courts have applied a "legal characteristics" test, which examines the legal separateness of the entity from the foreign state (if it can sue or be sued, hold property, or contract in its own name). *See Bowers v. Transportes Navieros Ecuatorianos (Transnave)*, 719 F. Supp. 166, 170 (S.D.N.Y. 1989). The *Hyatt* court declined to follow *O'Connell*, finding that congressional intent, apparent in the text and legislative history of the FSIA, was for political subdivisions to mean all governmental units that cannot act and may not be sued in their own name. By contrast, agencies or instrumentalities would mean governmental units which can act and may be sued in their own name. Thus, the court followed the "legal characteristics" test, and found that GGF was an agency of the Finnish government. *See Hyatt*, 945 F. Supp. at 681-84.

The court in *Hyatt* declined to follow three other courts that had already found that GGF was a political subdivision. Two of the decisions, *Balentine v. Union Mortgage Co.*, 795 F. Supp. 266 (N.D. Ill. 1992) and *Murray v. Union Mortgage Co.*, No. 91-0799-RV-M, 1992 WL 247409 (S.D. Ala. Jan. 14, 1992), were decided when Skopbank was actually owned by the Bank of Finland. In addition, the *Hyatt* court specifically declined to follow the reasoning of *Government Guarantee Fund of Finland v. Great*

cludes entities that are majority owned by an agency or instrumentality of a foreign state.

The court first looked to the FSIA's text and noted that sections 1603(a) and (b) directly contradict each other.¹⁶³ The court observed that the legislative history is equally contradictory.¹⁶⁴ The court further stated that the Second Circuit had never addressed the issue of tiering¹⁶⁵ so, contrary to the defendant's arguments, *O'Connell* was not controlling.¹⁶⁶ The court then recognized the

Cruz Bay Development Co., Civ. No. 1991-355, slip op. at 6 (D.V.I. Dec. 7, 1994), stating that the District Court for the Virgin Islands had merely accepted GGF's characterization of itself with no analysis and furthermore that the case had been decided before the Ninth Circuit had decided *Gates*. See *Hyatt*, 945 F. Supp. at 690. But see *Government Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 960 F. Supp. 931, 935 n.2 (D.V.I. 1997) (rejecting the result in *Hyatt* and finding that GGF was a political subdivision, and therefore Skopbank was an agency within the FSIA).

163. See *Hyatt*, 945 F. Supp. at 685. Like the *Gates* court, the *Hyatt* court found that following the directive of section 1603(a) literally, substituting "foreign state or political subdivision or agency or instrumentality" for "foreign state" in section 1603(b) produces the superfluous reading of "majority owned by a foreign state or political subdivision or political subdivision or agency or instrumentality." *Id.* Yet, the court recognized that a literal reading of section 1603(b) to mean only majority owned by a foreign state or political subdivision would directly contradict the directive of section 1603(a). See *id.* at 686.

164. See *id.* (quoting H.R. REP. NO. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614). The court observed that Congress used exactly the same terms found in the statute when discussing the majority owned requirement of section 1603(b), including the term "political subdivision" but omitting the term "agency or instrumentality." Thus, neither the House nor the Senate Committee Reports shed any new light on this dilemma. See *id.* It should be noted that the House and Senate Reports are identical. See S. REP. NO. 94-1310 (1976).

165. See *Hyatt*, 945 F. Supp. at 686. The court noted that while other courts have cited *O'Connell* as supporting the proposition that indirect ownership is allowed under the FSIA, a careful reading of *O'Connell* indicates that the court actually held that the defendant's parent company was a political subdivision, not an agency or instrumentality. See *id.* See *supra* note 97 for a list of cases that have relied upon *O'Connell* in holding that the FSIA permits tiering. The *Hyatt* court also reasoned that because the *O'Connell* court failed to analyze or even mention the implications of allowing tiering, it must therefore have never intended to allow tiering. See *Hyatt*, 945 F. Supp. at 686. In addition, the *Hyatt* court stated that if the *O'Connell* court had in fact allowed tiering, the courts in *Gates* and *Roselawn* would certainly have cited it. Thus, the *Hyatt* court reasoned, *O'Connell* could not have decided the issue of tiering. See *id.*

166. See *Hyatt*, 945 F. Supp. at 686. Ironically, if the *Hyatt* court had followed the *O'Connell* analysis on the threshold issue of whether GGF was a political subdivision or agency, the court would likely have found GGF to be a political subdivision and thus Skopbank would clearly have been included within the FSIA. The *O'Connell* court determined that the term political subdivision broadly includes all governmental units beneath the central government (the "core function" test) regardless of whether the entity has a separate legal identity (the "legal characteristics" test). See *O'Connell*, 734 F.2d at 116-17. The *Hyatt* court interpreted the term political subdivision more narrowly, and in doing so, declined to follow *O'Connell*. See *Hyatt*, 945 F. Supp. at 684. See *supra* notes 160-62 and accompanying text for a discussion of the "core function"

circuit split created by the *Roselawn* and *Gates* decisions, concluding that the solution to the tiering issue could not be found merely by looking at the FSIA's text and legislative history.¹⁶⁷

The *Hyatt* court then inferred Congress' intentions from the FSIA's ambiguous language and four other factors.¹⁶⁸ First, the court recognized the "separate entity" rule as the prevailing international rule, and a rule sometimes applied by pre-FSIA courts.¹⁶⁹ Second, the court found that in the FSIA, Congress explicitly rejected the presumption of corporate independence that is the basis for the "separate entity" rule.¹⁷⁰ Third, the *Hyatt* court echoed the *Gates* court in pointing out the remoteness of subsidiary corporations from actual governmental control.¹⁷¹ Finally, the *Hyatt* court listed the serious implications of allowing tiering. The loss of a right to a jury trial,¹⁷² potential problems in obtaining personal jurisdiction,¹⁷³ loss of the traditional right to choice of forum,¹⁷⁴ and a shifting of the burden of production when proving that one of the FSIA's exceptions to immunity applies¹⁷⁵ are all serious conse-

test as opposed to the "legal characteristics" test and the *Hyatt* court's determination of whether GGF was a political subdivision or an agency or instrumentality.

167. See *Hyatt*, 945 F. Supp. at 688. The court also noted that the United States District Court for the Southern District of New York had already expressly followed the Ninth Circuit's reasoning in *Gates*. See *id.* at 687 (citing *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125, 130 (S.D.N.Y. 1995)).

168. See *id.* at 690.

169. See *id.* at 688. Under the "separate entity" rule, corporations with a separate legal existence are presumed to be independent from the foreign state and thus are denied sovereign immunity. For a complete explanation of the "separate entity" rule, see Hoffman, *supra* note 15, at 542-43; see also *supra* Part I.A.2 for a discussion of the "separate entity" rule.

170. See *Hyatt*, 945 F. Supp. at 688. See Part I.C.3 for the text of section 1603(b)(1), which requires an agency or instrumentality to have a separate legal existence from the foreign state (yet still allows the entity to qualify for sovereign immunity).

171. See *Hyatt*, 945 F. Supp. at 688-89.

172. See *id.* at 689.

173. See *id.* If a corporation falls within the FSIA, the terms of the commercial activity exception rather than the particular state's long arm statute serves as the basis for obtaining personal jurisdiction. Under the FSIA, the act establishing the nexus to the United States must be the same as the act giving rise to the claim. See 28 U.S.C. § 1605(a)(2) (1994); see also *Barkan v. General Admin. of Civil Aviation of China*, 822 F.2d 11, 13 (2d Cir. 1987); Hoffman, *supra* note 15, at 574-75. Thus, the *Hyatt* court noted that there will be situations where a plaintiff will not be able to obtain jurisdiction even though personal jurisdiction could be obtained through the state's long-arm statute. As an example, the court cited *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 199 (5th Cir. 1984). See *Hyatt*, 945 F. Supp. at 689.

174. See *Hyatt*, 945 F. Supp. at 689.

175. See *id.* Prior to the FSIA, a defendant foreign corporation carried the com-

quences that befall a plaintiff whenever a foreign defendant is included within the FSIA.¹⁷⁶ The court concluded that Congress would have been more explicit if it indeed had intended such far reaching consequences.¹⁷⁷ Thus, the *Hyatt* court held that the FSIA does not allow tiering.¹⁷⁸

III. A FRESH EXAMINATION OF THE TIERING ISSUE

The Seventh and Ninth Circuits both employed traditional methods of statutory interpretation to arrive at their respective solutions to the issue of tiering. The Ninth Circuit, in *Gates v. Victor Fine Foods*,¹⁷⁹ then looked at the broad implications of allowing tiering and concluded that Congress could not have intended to allow tiering.¹⁸⁰ Conversely, the Seventh Circuit, in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*,¹⁸¹ concluded that Congress intended to allow tiering according to the plain language of the statute and its legislative history.¹⁸² The *Roselawn* court added that whatever the practical implications of allowing tiering, a court's proper role in interpreting a statute is merely to carry out congressional intent.¹⁸³

The United States District Court for the Southern District of New York, in *Hyatt Corp. v. Stanton*,¹⁸⁴ finding the plain language of the statute ambiguous, the legislative history unhelpful, and the reasoning of neither the Ninth nor the Seventh Circuits persuasive, formed its understanding of section 1603(b) from an historical view of sovereign immunity before the enactment of the FSIA.¹⁸⁵ The

plete burden of proof to establish that sovereign immunity applied. *See Hoffman, supra* note 15, at 584; Kane, *supra* note 43, at 415-16. Under the FSIA, once the defendant proves that it is a foreign state, the plaintiff must carry the burden of production that an exception applies. At that point, the defendant corporation has the burden of proof regarding the issue of whether an exception actually applies. *See Hyatt*, 945 F. Supp. at 689 (citing *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*, 12 F.3d 317 (2d Cir. 1993)).

176. *See Hyatt*, 945 F. Supp. at 689.

177. *See id.* at 690. Accordingly, the court stated that "[i]f Congress so intended, I believe it would have been as explicit as it was in extending immunity to corporations majority-owned by foreign states or their political subdivisions." *Id.* The court cited *Hoffman, supra* note 15, in support of this reasoning. *See Hyatt*, 945 F. Supp. at 688.

178. *See Hyatt*, 945 F. Supp. at 690.

179. 54 F.3d 1457 (9th Cir. 1995).

180. *See id.* at 1462.

181. 96 F.3d 932 (7th Cir. 1996).

182. *See id.* at 940.

183. *See id.*

184. 945 F. Supp. 675 (S.D.N.Y. 1996).

185. *See id.* at 688.

Hyatt court found that the FSIA, by plain language, already enlarged the scope of sovereign immunity by including foreign-government-owned corporations.¹⁸⁶ The *Hyatt* court reasoned that if Congress intended to so drastically depart from past practice as to also extend immunity protection to all subsidiaries of foreign-government-owned corporations, Congress would surely have discussed the issue somewhere in the text or legislative history.¹⁸⁷ Therefore, the *Hyatt* court concluded that tiering should not be allowed.¹⁸⁸

This Note examines the text and the legislative history of section 1603(b) and concludes that the Ninth Circuit was correct in its determination that Congress never intended to extend immunity protection to corporations merely because they are majority owned by an agency or instrumentality. This Note next examines the slightly different issue of whether Congress intended to grant immunity benefits to corporations that are indirectly majority owned by a foreign state, through controlling ownership in intermediate corporations. This Note acknowledges that the FSIA's text and legislative history do not reveal a clear congressional intent to require direct ownership. This Note suggests, however, that a requirement of direct ownership better fulfills the FSIA's clearly stated purposes.

This Note then suggests that the *Hyatt* court was correct in its common sense historical approach to the problem of tiering. This Note builds on the *Hyatt* court's reasoning by contrasting a traditional governmental instrumentality with the purely commercial corporation that typically seeks FSIA immunity benefits. This Note suggests that the reasons for granting immunity benefits to traditional instrumentalities do not exist for these subsidiary corporations. Finally, this Note includes a comparative view of sovereign immunity as practiced in other countries. This Note observes that it makes no sense for United States courts to extend immunity benefits to foreign-government-owned corporations when other countries do not extend similar protections. This Note concludes that tiering of indirect ownership interests should not be allowed under the FSIA.

186. *See id.*

187. *See id.* at 689-90.

188. *See id.* at 690.

A. *Does the FSIA Include Corporations Because They Are Majority Owned by an Agency or Instrumentality?*

1. Plain Language of the Text

In defining an agency or instrumentality, section 1603(b)(2) clearly states “majority . . . owned by a foreign state or political subdivision”¹⁸⁹ It does not add “or agency or instrumentality.” Thus, according to the plain language of the text, an agency or instrumentality may be majority owned by a foreign state or political subdivision, but not by another agency or instrumentality.

The Seventh Circuit in *Roselawn* reasoned that because section 1603(a) states that the term “foreign state” includes “a political subdivision of a foreign state or agency or instrumentality,” section 1603(b)(2) must be read “majority owned by a foreign state (including an agency or instrumentality) or political subdivision.” The Ninth Circuit in *Gates* was correct, however, in noting that the text then becomes redundant, as section 1603(b)(2) then literally reads “majority owned by a foreign state (including a political subdivision or agency or instrumentality) or political subdivision.”¹⁹⁰ As the Ninth Circuit reasoned, if Congress intended this interpretation, it could have easily avoided the redundant aspect of this reading by simply stating that an entity must be majority owned by a foreign state, political subdivision, or an agency or instrumentality.¹⁹¹

Neither the *Gates* nor *Roselawn* courts considered the fact that section 1603 is a definition section, in which each term is separately explained for correct use in later sections of the statute.¹⁹² If Congress intended that an agency or instrumentality could be majority owned by another agency or instrumentality, it clearly could have stated so in its definition of agency or instrumentality.¹⁹³ Of course,

189. 28 U.S.C. § 1603(b)(2) (1994).

190. See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) (suggesting that the literal language of the statute forbids the inclusion of entities majority owned by an agency or instrumentality); see also *Hyatt*, 945 F. Supp. at 687 (citing the reasoning specifically attributed to Judge Greenberg in *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993), that Congress’ explicit use of the term “political subdivision” in section 1603(b)(2) precludes the possibility that Congress intended to implicitly also include entities that are majority owned by an agency or instrumentality); *Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, No. CIV. A. 96-5217, 1997 WL 539763, at *5 n.9 (E.D. Pa. Aug. 11, 1997) (citing the dictum in *Federal Ins. Co.* that the language of section 1603(b)(2) precludes a finding that majority ownership by an agency or instrumentality is allowed under the FSIA).

191. See *Gates*, 54 F.3d at 1462.

192. See 28 U.S.C. § 1603. The section begins, “Definitions. For purposes of this chapter” *Id.* (emphasis added).

193. See 28 U.S.C. § 1603(b). See *supra* Part I.C.3 for the text of section 1603(b).

it is possible that Congress intended to leave it up to the reader of section 1603(b) to realize that the preceding subsection had altered the commonly understood plain meaning of the term "foreign state," to substitute the appropriate phrases, and to accept the resulting superfluous language. However, it is more reasonable to assume that Congress meant exactly what the plain language of section 1603(b)(2) says: that the entity be majority owned by a foreign state or political subdivision, and that a foreign state does not include an agency or instrumentality for this purpose.¹⁹⁴

2. Legislative History Supports the Plain Language of the Text

The *Roselawn* court found that whenever Congress used the term "foreign state," it actually intended "foreign state, political subdivision, and agency or instrumentality."¹⁹⁵ The *Roselawn* court supported this interpretation with reference to the House Report which states that section 1603(a)'s definition of "foreign state" applies to all provisions of the Act except section 1608, where it refers only to a foreign sovereign.¹⁹⁶ According to the *Roselawn* court, Congress carefully distinguished between a "foreign state," which includes agencies and instrumentalities, and a "foreign sovereign" which does not.¹⁹⁷ The *Roselawn* court thus found that the language of section 1603(b)(2), "majority whose shares or other ownership interest is owned by a foreign state" clearly means "owned by a foreign state or agency or instrumentality of a foreign state."¹⁹⁸

The *Gates* court, on the other hand, found that Congress, aware of the difference between "organs and political subdivisions of foreign states," and "agencies or instrumentalities of foreign states," intentionally included the former in section 1603(b)(2), but

194. See *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (stating, in dicta, that an "entity wholly owned by an 'agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603 (b)(2)").

195. See *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932, 940 (7th Cir. 1996).

196. See *id.*; see also H.R. REP. NO. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6613. The court also noted that a distinction between "foreign state" and "foreign government" is made in section 1611(b) which states that the property of a "foreign state" is immune from attachment if the property is that of its parent "foreign government." See *Roselawn*, 96 F.3d at 940.

197. See *Roselawn*, 96 F.3d at 940.

198. See *id.* (stating that "[t]o limit 'foreign state' to 'foreign sovereign' or 'foreign government' would be to rewrite the Act, which is obviously beyond our role as judges").

not the latter.¹⁹⁹ Because Congress so carefully distinguished between the terms in the House Report, the *Gates* court reasoned, it would also have been careful about the use of these terms in the text.²⁰⁰

One passage of the House Report that neither court considered states that “[w]here ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency of a foreign state *only* if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or political subdivision.”²⁰¹ The fact that Congress stated an entity will *only* be an agency if owned by a foreign state or political subdivision confirms the narrow holding of the *Gates* court. The *Roselawn* court was mistaken in assuming that Congress intended to implicitly include entities that are also majority owned by agencies or instrumentalities.

The *Roselawn* court looked to a list of entities that Congress stated could constitute agencies or instrumentalities within the FSIA.²⁰² The *Roselawn* court went too far, though, in using the fact that Congress listed airlines such as the defendant corporation ATR as proof that Congress intended to allow tiering.²⁰³ The House Report nowhere suggests that the listed entities will *always* fit the definition of agencies and instrumentalities. It merely states that these entities *could* be included, but only if they meet the other requirements of an agency.²⁰⁴

199. See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) (stating that the entity must be “either an organ of a foreign state (or of a foreign state’s political subdivision), or that a majority of the entity’s shares or other ownership interest be owned by a foreign state (or by a foreign state’s political subdivision)”) (quoting H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614). For a discussion of the relevant text of the House Report, see *supra* notes 86 and 88.

200. See *Gates*, 54 F.3d at 1462.

201. H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614 (emphasis added).

202. See *Roselawn*, 96 F.3d at 940 (pointing to the statement in the House Report that instrumentalities can assume many different forms). “As a general matter, entities which meet the definition of an ‘agency or instrumentality of a foreign state’ could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.” H.R. REP. NO. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

203. See *Roselawn*, 96 F.3d at 940-41 (stating that even if the literal reading of the text became superfluous, the court must follow the broad intent of the FSIA, “in which corporations with ATR’s precise characteristics may be considered an agency or instrumentality of a foreign state”).

204. See H.R. REP. NO. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

An analysis of the text and legislative history therefore confirms the correctness of the *Gates* holding, that Congress did not intend to broadly extend FSIA protections to foreign-government-owned corporations merely because they are majority owned by an agency or instrumentality. The *Gates* holding, however, is not a completely satisfactory solution to the issue of tiering, for it leaves unanswered a larger question: may a foreign-government-owned corporation qualify for FSIA benefits, not because its parent corporation is an agency, but because a majority of its ownership shares or other ownership interests can ultimately be traced to a foreign state?

B. *A Restatement of the Issue: Does the FSIA Include Corporations That Are Indirectly Majority Owned by a Foreign State?*

A restatement of the issue of tiering to focus on the amount of ownership interest that can be attributed, albeit indirectly, to a foreign state turns the attention away from the sleight of statutory language analysis engaged in by the Seventh and Ninth Circuits, and focuses on issues of control as accepted by pre-*Gates* courts.²⁰⁵ Indirect ownership by a foreign state had qualified foreign corporations for sovereign immunity for almost two decades following the passage of the FSIA with little or no analysis.²⁰⁶ The Seventh and Ninth Circuits are the only courts of appeals that have directly analyzed the issue of tiering, and both courts based their reasoning on majority ownership by an agency or instrumentality of a foreign state.²⁰⁷ The issue of whether indirect ownership interests of a foreign state may count for section 1603(b)'s majority ownership requirement has not to date been directly analyzed by a court of appeals.

The House Report specifically states that “[a]n entity which does not fall within the definitions of sections of 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court.” *Id.*

205. See *supra* Part II.A for a discussion of courts’ treatment of the issue of tiering before the current circuit split. For a discussion of the two separate questions presented by the issue of tiering, see *Linton v. Airbus Industrie*, 934 S.W.2d 754 (Tex. 1996), where tiering was allowed, but was limited to cases where the parent corporation had a direct majority ownership by a foreign state.

206. See *Roselawn*, 96 F.3d at 939. The *Roselawn* court observed that until very recently, courts did not require direct majority ownership by a foreign state. “[N]early all courts which have confronted indirect or ‘tiered’ ownership situations have considered majority state-owned corporations to be ‘agencies or instrumentalities of foreign states’ under the FSIA” *Id.*

207. See *supra* Part II.B.1-2 for discussions of the respective courts’ reasoning.

1. The Text and Legislative History Are Ambiguous

Section 1603(b)(2) clearly specifies that stock ownership is the test to establish agency within the FSIA.²⁰⁸ Because Congress stated “owned by,” and did not include the terms “indirectly owned by” or “controlled by” or even “attributable to,” it is logical to assume that Congress intended to require direct ownership of a foreign state.²⁰⁹ An entity “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision” then would plainly mean only an entity directly owned by a foreign state or political subdivision.²¹⁰

The addition of the words “or other ownership interest” adds ambiguity, though, to the otherwise plain meaning of the text, and supports the alternate argument that Congress intended something other than stock ownership, for example, indirect ownership interests or control, to also be measured.²¹¹ Conversely, had Congress simply stated “ownership interests,” without the mention of stock ownership, section 1603(b) clearly would be broad enough to allow indirect ownership.²¹²

208. See 28 U.S.C. § 1603(b)(2) (1994) (“a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision”).

209. The law measures ownership of a corporation differently depending on the legal setting of the issue. See Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 299 (1996) (discussing the value of applying enterprise law as opposed to traditional corporation law). When ownership of a subsidiary corporation is tiered through an intermediate corporation, indirect ownership and ultimate control of the subsidiary lies with the parent corporation, but legal ownership of the subsidiary resides in the intermediate corporation that possesses the subsidiary’s shares of stock.

Thus, courts have held that ownership for tax purposes requires ownership or actual holding of a certain percentage of shares of stock. See *id.* at 300. On the other hand, courts have held that ownership for purposes of holding a parent corporation liable for the actions of its subsidiary (known as “piercing the veil”) rests on proof of indirect ownership or control. See *id.*

210. The House Report, describing the requirement of section 1603(b)(2), states that “a majority of the entity’s shares or other ownership interest [must] be owned by a foreign state (or by a foreign state’s political subdivision).” H.R. REP. NO. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

211. The House Report also reflects this ambiguity, stating that the entity will qualify as an agency or instrumentality “only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or a foreign state’s political subdivision.” H.R. REP. NO. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. at 6614.

212. See Thad T. Dameris & Michael J. Mucchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. AIR L. & COM. 959, 972 (1997) (arguing that the FSIA allows tiering of indirect interests). The authors claim that because the text of section 1603(b)(2) does not state the words “direct” it must be assumed that Congress intended to allow indirect equitable or beneficial ownership interests. See *id.* The authors present a hypothetical, whereby a foreign

By specifying stock ownership as the appropriate measure, however, Congress at least intended to set direct ownership as the standard.²¹³ Congress could logically have added the qualifying “other ownership interests” to section 1603(b)’s text (and “or otherwise” to the House Report) to include those entities with ownership measured by something other than shares of stock, such as

government (directly) owns 49.9 percent of each tier in a chain of intermediate entities. *See id.* at 973. After the second tier, the foreign government would (indirectly) own almost 87.49 percent of the entity applying for FSIA immunity. After the third tier, the foreign government would (indirectly) own almost 93.74 percent. “Paradoxically, if tiering were prohibited, an entity owned almost exclusively by foreign sovereigns would be denied FSIA immunity, while [another] entity with merely 50.01 percent direct, foreign-sovereign ownership would enjoy such immunity.” *Id.* at 973-74.

The author’s hypothetical may be countered by another hypothetical, where through a tiered corporate system, a foreign sovereign directly owns 50.01 percent of the first tier. The first tier corporation has 50.01 percent direct ownership of many second tier subsidiaries. Each second tier subsidiary has 50.01 percent direct ownership of many third tier subsidiaries. If tiering were allowed, and control measured instead of actual ownership of stock, then the foreign government, through majority ownership of the first tier corporation, would enjoy majority indirect ownership or control of all of the entities in the tiered system. A huge number of corporations with no direct ownership by the foreign state would nonetheless qualify for removal to federal court and potential sovereign immunity. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995). Furthermore, the time and effort spent litigating the amount of control actually enjoyed by a particular foreign state would come at a great cost to the certainty that the FSIA was intended to bring United States plaintiffs. *See H.R. REP. NO. 94-1487*, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. For a discussion of the goals of the FSIA, see *infra* Part III.B.3.

213. *See First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba* (First Citibank), 462 U.S. 611 (1983) (finding that a Cuban nationalized bank, an agency or instrumentality within the FSIA, was liable for debt as an agent of the Cuban government). The Supreme Court stated that Congress set stock ownership as the measure of an agency or instrumentality for FSIA purposes. The determination of whether a corporation is an agency or instrumentality under the FSIA is therefore entirely separate from the substantive determination of whether an agency or instrumentality relationship exists between parent and subsidiary corporation for purposes of imposing liability. *See id.* at 620-21.

The Court held that a corporation’s qualification as an FSIA agency or instrumentality is irrelevant to proving it an agency for purposes of liability, where arguments such as “indirect control” and “substance over form” come into play. *See id.* While *First Citibank* did not involve the issue of tiering, the Court’s discussion should make courts wary of confusing the term “agency” for FSIA purposes with the term “agency” as used to determine an alter ego relationship for purposes of establishing liability. Courts should not automatically equate notions of indirect ownership and control with section 1603(b)(2)’s statutory requirement of majority ownership of stock. *See supra* note 99 for a list of cases in which courts have found agency within the FSIA using traditional arguments of common law agency. *See also Hester Int’l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 177 n.5 (5th Cir. 1989) (stating that whether an alter ego relationship described in terms of “agency” exists is a completely different inquiry from determining whether an entity is an “agency” within the FSIA).

state trading companies or governmental associations.²¹⁴ For further clarification, Congress then could have added the following refinement: “[a]s a general matter, entities which meet the definition of an ‘agency or instrumentality of a foreign state’ could assume a variety of forms, including a state trading corporation”²¹⁵ Without a clear explanation in the text or House Report, though, the words “or other ownership interests” do leave room to interpret the statute as either requiring direct ownership or, alternatively, allowing indirect ownership.

2. A Direct Ownership Requirement Furthers the FSIA’s Broad Purpose

Although the FSIA’s text and legislative history may be ambiguous, an examination of the purpose of the FSIA lends strength to the argument that the FSIA does not allow tiering. In enacting the FSIA, Congress attempted to balance the competing interests of United States citizens with the larger federal interests served by extending sovereign immunity to foreign states in a manner consistent with international standards.²¹⁶

214. See H.R. REP. NO. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614. It is clear that Congress envisioned that entities other than traditional stock-issuing corporations could be agencies. “As a general matter, entities which meet the definition of an ‘agency or instrumentality of a foreign state,’ could assume a variety of forms, including a state trading corporation . . . an export association, a government procurement agency or a department or ministry which acts and is suable in its own name.” *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

By specifying that stock ownership is not the only way a corporation may be included within the FSIA, Congress avoided an issue that has created confusion in an analogous legal area, that of United States-government-owned corporations. 28 U.S.C. § 1349 denies federal jurisdiction to “agencies” of the United States unless the United States is the owner of more than one-half its capital stock. See 28 U.S.C. § 1349 (1994). A split has developed in the United States courts of appeals because of a disagreement over whether entities with no stock at all may be included within the statute’s protection on an alternate showing of majority control. See *Burton v. United States Olympic Comm.*, 574 F. Supp. 517, 523 (C.D. Cal. 1983). For an in-depth discussion of the law’s treatment of United States agencies, see Christina Maistrellis, Comment, *American National Red Cross v. S.G. & A.E.: An Open Door to the Federal Courts for Federally Chartered Corporations*, 45 EMORY L.J. 771 (1996); Richard Neumig, Annotation, *What Is an “Agency” for Purposes of 28 U.S.C. § 1345, Granting Original Jurisdiction to United States District Courts of Civil Actions by any Agency of the United States*, 51 A.L.R. Fed. 874 (1981).

215. H.R. REP. NO. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

216. See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 493 (1983). “Actions against foreign sovereigns . . . raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident. To promote these federal interests, Congress exercised its Article I powers by enacting [the FSIA].” *Id.* (citations omitted).

Congress enacted the FSIA to provide certainty to United States plaintiffs, by delineating exactly how, where, and when a suit may be brought against a foreign state and its entities.²¹⁷ A requirement of direct ownership supports this goal in three ways. First, it provides a clear and predictable measure that avoids litigation over control issues. Second, it provides more certainty to United States plaintiffs by limiting the number of corporations which qualify for the benefits of the FSIA.²¹⁸ Third, Congress was aware that in some cases a United States citizen may not even know that an entity with whom he or she is dealing has ties to a foreign state, until after a claim is brought.²¹⁹ Because direct ownership is easier to ascertain in advance, plaintiffs face a lower risk of unfair surprise and are better able to protect themselves by obtaining a waiver of immunity.²²⁰

217. See H.R. REP. NO. 94-1487, at 6-7, *reprinted in* 1976 U.S.C.C.A.N. at 6604. Congress stated that the FSIA was to “provide when and how parties [could] maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state [was] entitled to sovereign immunity.” *Id.* at 6, *reprinted in* 1976 U.S.C.C.A.N. at 6604. See *supra* Part I.C.1 for a complete discussion of Congress’ purpose in enacting the FSIA.

218. See *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) (reasoning that allowing tiering would extend the benefits of immunity to a vast number of entities far beyond Congress’ intentions).

219. See H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. “[The situation may arise] when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity . . .” *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 6605. “In a modern world where foreign state enterprises are every day participants in commercial activities, [the FSIA] is urgently needed legislation.” *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 6605. See Hoffman, *supra* note 15, at 569-71 for a discussion of what Hoffman terms the “hidden identity” of foreign sovereigns who directly own corporations.

If foreign corporations that are directly owned by a foreign government have a “hidden identity,” consider how much more of a problem is the “hidden identity” of those corporations whose ownership by a foreign state is masked by several tiers of intermediate corporations. While an American corporation doing business with foreign corporations may anticipate a potential immunity question and protect itself with a waiver, the average citizen often has no way of knowing ahead of time that a corporation is indirectly majority owned by a foreign state.

220. There are many cases in which United States citizens have found that their ability to recover damages was impacted in a negative way by the foreign corporate defendant’s indirect, and in some cases hidden, ownership by a foreign state. Consider the sixty-four families of the *Roselawn* air crash victims, who lost their right to sue in their home state courts in front of a jury because the airline manufacturer was found to be partially and indirectly owned by France and Italy. See *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932, 941 (7th Cir. 1996); see also *Talbot v. Saipem A.G.*, 835 F. Supp. 352 (S.D. Tex. 1993) (involving a worker who sued for injuries occurring on boat indirectly majority owned by Italy); *Rutkowski v. Occidental Chem. Corp.*, No. 83-C-2339, 1988 WL 107342 (N.D. Ill. Oct. 5, 1988) (involving a wife who sued a chemical corporation indirectly majority owned by Canada after her hus-

Although concerned with the rights of United States plaintiffs, Congress nevertheless recognized that there are valid reasons why some degree of special protection should be accorded to foreign-government-owned corporations.²²¹ Thereby, as the United States District Court for the Southern District of New York in *Hyatt Corp. v. Stanton* recognized, Congress departed from the traditional immunity treatment accorded to foreign-government-owned corporations and enacted section 1603(b).²²² Congress intentionally granted certain benefits to foreign corporations that were found to be “foreign states” for purposes of the FSIA.²²³ Allowing tiering of ownership interests, however, would carry this special consideration beyond the state owned entities explicitly included by Congress.²²⁴

Congress recognized the fact that most foreign-government-owned corporations are purely commercial with no governmental purpose at all,²²⁵ yet decided to extend the presumption of governmental purpose to an entity that is majority owned by a foreign government.²²⁶ Section 1603(b) explicitly delineates three requirements that a corporation must meet in order to qualify as an agency

band died from asbestos poisoning); *cf.* *New York Bay Co. v. State Bank of Patalia*, No. 93 Civ. 6075 (WK), 1994 WL 369406 (S.D.N.Y. July 12, 1994) (involving FSIA jurisdiction so that the Christian Children’s Fund could sue to recover \$400,000 misappropriated by a bank indirectly majority owned by India); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, Civ. A. Nos. 84-0105, 84-5442, 1987 WL 4766 (E.D. La. Apr. 8, 1987) (involving an engine manufacturer indirectly majority owned by France that was successfully brought within the FSIA so that a boat company could recover damages).

221. *See Verlinden*, 461 U.S. at 488-89 (stating that Congress recognized the “potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area”); *see also* *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba* (*First Citibank*), 462 U.S. 611, 624-28 (1983) (recognizing that Congress intended to grant certain benefits to state owned corporations that are instrumentalities within the FSIA); *Roselawn*, 96 F.3d at 937 (stating that Congress intended to promote uniformity in cases involving foreign governments by providing “a means of escape from potentially biased state court proceedings”).

222. *See Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 648 (S.D.N.Y. 1996); *see also* JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 20 (1988) (stating that prior to the FSIA, a foreign-government-owned corporation was not accorded immunity at all unless it proved that it was performing a public function).

223. *See supra* Part I.C.3 for a discussion of the benefits that automatically fall to a foreign corporation that is found to be within the FSIA.

224. *See Hyatt*, 945 F. Supp. at 689-90 (finding that Congress was specific in including directly state owned corporations within the FSIA).

225. *See First Citibank*, 462 U.S. at 624-28 (discussing in depth the nature of an instrumentality and the reason why the FSIA accords them a separate legal personality distinct from the foreign state).

226. This presumption may be overcome with proof of a commercial activity. *See supra* Part I.C.2 for an explanation of the interaction of the presumption of governmental purpose and the commercial activity exception.

or instrumentality.²²⁷ Congress was deliberate in stating the necessary criterion, to ensure that this presumption of governmental purpose would be extended only to those entities that fulfill all of the statutory requirements.²²⁸ As the *Hyatt* court reasoned, in light of the vast increase in the numbers of entities that would qualify for the benefits of the FSIA, and in light of the detrimental implications that a broad interpretation of section 1603(b) would have on United States plaintiffs, immunity benefits should not be extended to entities beyond those that Congress explicitly included in the FSIA.²²⁹

C. Tiering—*The Practical Reality*

The *Hyatt* court approached the issue of tiering by pointing out that historically, United States courts never offered the blanket protection of sovereign immunity to foreign-government-owned corporations.²³⁰ The court then acknowledged that in enacting the FSIA, Congress intentionally enlarged the scope of immunity extended to these foreign-government-owned corporations.²³¹ To determine how far Congress intended to extend immunity protections, the *Hyatt* court looked realistically at the negative consequences tiering has on United States plaintiffs, and concluded that tiering of indi-

227. See 28 U.S.C. § 1603(b) (1994). The three criteria are (1) that the entity be a separate legal person, (2) that the entity be either an organ of a foreign state or of a foreign state's political subdivision, or that a majority of the entity's shares or ownership interests be owned by a foreign state or by a foreign state's political subdivision, and (3) that the entity not be a citizen of the United States or incorporated under the laws of a third country. See H.R. REP. NO. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

228. See H.R. REP. NO. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. at 6614. The House Report specifically states that an entity not falling within the definitions of sections 1603(a) or (b) will not be entitled to sovereign immunity in any case before either a state or federal court. See *id.*, reprinted in 1976 U.S.C.C.A.N. at 6614. Congress' deliberateness is evidenced in the House Report's explanation for the third criterion. "The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature." *Id.*, reprinted in 1976 U.S.C.C.A.N. at 6614.

229. See *Hyatt*, 945 F. Supp. at 690. The *Hyatt* court found that the loss of a right to a jury trial, the stricter nexus requirement for jurisdiction under the FSIA, the power of removal to federal court, and the plaintiff's bearing the burden of production as to the applicability of an exception are all consequences to American plaintiffs serious enough to not allow tiering on the basis of the ambiguous language of section 1603(b)(2). See *id.* at 689-90. For a further discussion of the *Hyatt* court's reasoning, see *supra* notes 168-77 and accompanying text.

230. See *Hyatt*, 945 F. Supp. at 688.

231. See *id.*

rect ownership interests is not allowed.²³² The *Hyatt* decision makes sense because it is based on a practical evaluation of the actual results of tiering.

Accordingly, *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*²³³ was wrongly decided, not only because the Seventh Circuit misinterpreted the interrelation between sections 1603(a) and 1603(b) of the FSIA, but because of the practical effect of the decision. The *Roselawn* court extended foreign sovereign immunity benefits to a commercial airline company because one of its several parent corporations was owned by another corporation that was owned by France and Italy. The *Roselawn* court extended these benefits to the airline at a tremendous cost to American plaintiffs, who, because those who died in the crash had bought their airline seats on American Eagle,²³⁴ lost their right to bring suit in their respective state courts and their right to a jury trial.²³⁵

Likewise, *Gates v. Victor Fine Foods*²³⁶ was correctly decided by the Ninth Circuit, not only because the court properly interpreted the plain language of section 1603(b), but because the court realized that allowing tiering extends the benefits of the FSIA to a virtually unlimited number of commercial corporations.²³⁷

To fully appreciate the practical effects of tiering, it is instructive to examine the typical foreign-government-owned corporation in a tiered corporate structure seeking FSIA protections today.

1. A Traditional Instrumentality Compared to a Subsidiary in a Multi-Tiered Corporation

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (First Citibank),²³⁸ the Supreme Court examined the nature of the government instrumentality that Congress meant to protect in the FSIA.²³⁹ The Court observed that during this century, governments have commonly established corporations to perform a variety of governmental tasks.²⁴⁰ While the organization

232. See *id.* at 689-90.

233. 96 F.3d 932 (7th Cir. 1996).

234. The American Eagle plane was manufactured by ATR, which is jointly owned by French and Italian corporations, which in turn claimed indirect ownership by France and Italy. See *id.* at 935, app. A. at 948.

235. See *supra* Part I.C.3 for an explanation of the benefits of the FSIA.

236. 54 F.3d 157 (9th Cir. 1995).

237. See *id.* at 1462.

238. 462 U.S. 611 (1983).

239. See *id.* at 624-25.

240. See *id.* at 624; see also W. Friedmann, *Government Enterprise: A Compara-*

and type of governmental control of these instrumentalities may vary, the Court found that they have certain qualities in common.²⁴¹ These instrumentalities are established as separate legal entities, and typically run as distinct economic enterprises, with a greater degree of flexibility and independence from close political control than normal governmental agencies.²⁴² The Supreme Court observed that in developing countries, governments establish these instrumentalities in order to raise capital needed for large government projects.²⁴³ “Public enterprise, largely in the form of development corporations, has become an essential instrument of economic development”²⁴⁴ In *First Citibank*, the Court held that with the FSIA, Congress specifically accorded these instrumentalities some of the same protections traditionally accorded to foreign states while still granting them a presumption of independence for liability purposes, that may be overcome only through proof of a principal and agent relationship.²⁴⁵

A subsidiary corporation in a tiered hierarchical foreign-government-owned enterprise, however, is far removed from the traditional foreign government instrumentality furthering the foreign government's purposes the Supreme Court described in *First Citibank*.²⁴⁶ Indeed, a realistic view of the typical foreign-government-owned corporation is that it is entirely commercial in purpose.²⁴⁷ Traditional sovereign immunity principles have never extended immunity to commercial corporations that have no gov-

tive Analysis, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 303, 306-07 (W. Friedmann & J.F. Garner eds., 1970).

241. See *First Citibank*, 462 U.S. at 624. The Court states that “[a] typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law.” *Id.*

242. See *id.* at 624-25.

243. See *id.* at 625.

244. *Id.* (citing Friedmann, *supra* note 240, at 333-34).

245. Thus, assets of the foreign-government-owned corporation are treated as distinct from the foreign government. See *id.* at 625-26, 627. “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 attracted.” *Id.* at 626 (quoting *Anderson v. Abbot*, 321 U.S. 349, 362 (1944)).

246. See Friedmann, *supra* note 240, at 325. “The crux of the matter is that the public corporation is a new type of institution which has sprung from new social and economic situations and changing functions of Government” *Id.*

247. See Hoffman, *supra* note 15, at 566-67 (stating that the public commercial sector is so widespread that “one may safely say that most state-owned corporations are engaged in commercial activities”); see also R.P. Short, *The Role of Public Enterprises: An International Statistical Comparison, in PUBLIC ENTERPRISE IN MIXED ECONOMIES*

ernmental purpose whatsoever.²⁴⁸ There is no valid reason for the FSIA to benefit these corporations at the expense of fairness to United States plaintiffs.²⁴⁹ A requirement of direct foreign government ownership, while not ensuring the possibility, at least maximizes the probability that the FSIA protects only the type of governmental instrumentality envisioned by Congress as stated by the Supreme Court in *First Citibank*.

2. A Comparative Look at Sovereign Immunity Abroad

Following the *Hyatt* court's evaluation of the actual effects of tiering, an examination of how the FSIA's immunity policy fits within international foreign sovereign immunity standards also supports a requirement of direct ownership.²⁵⁰

In the international community, the United States stands alone

110, 115 (Robert H. Floyd et al. eds., 1984) (presenting a study of state-owned enterprises).

248. See DELLAPENNA, *supra* note 222, at 20-21. For a discussion of sovereign immunity principles as used in United States courts, see *supra* Part I.A.

249. In the unusual case where an indirectly-government-owned foreign corporation does serve a governmental purpose, agency status is still possible if the court finds that the defendant corporation is an organ of the foreign government. See 42 U.S.C. § 1603(b)(2) (1994) ("An agency or instrumentality means any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . ."); *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996) (following *Gates* and declining to allow tiering, but holding that a court may find a corporate defendant to be an organ of a foreign state when: (1) the corporation has a governmental purpose, (2) the government actively controls the corporation, (3) the foreign government hires and compensates the corporate employees, and (4) the laws of the foreign state treats the corporation as part of the government); see also *Southern Ocean Seafood Co. v. Holt Cargo Sys.*, No. CIV.A. 96-5217, 1997 WL 539763, at *4-5 (E.D. Pa. Aug. 11, 1997) (finding TOWFC, a fishing commission established to protect Maori rights, has a clear government purpose, and is an organ and thus an agency of New Zealand; finding a corporation owned by TOWFC is not an agency, because majority ownership by an agency within the FSIA does not grant agency status).

250. See Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 51 (1992). The author suggests that the only meaningful comparative analysis of international law is based not on how a particular entity is treated by other nations, but rather how that entity is treated by its own government. See *id.* Such a comparison is impossible in this case because there are no comparable tiered state-owned commercial enterprises in the United States. The United States, unlike European, socialist, or developing third world countries, does not invest in commercial enterprises and so its agencies are entirely different from commercial corporations in a tiered corporate structure. Differences include the fact that United States agencies, such as the American Red Cross and the United States Olympic Committee are almost exclusively non-profit, do serve a governmental purpose, and ownership is direct. See *supra* note 214 for an explanation of how U.S. courts treat United States owned corporations.

in extending foreign sovereign immunity protections to commercial corporations on the basis of governmental ownership.²⁵¹ Other countries decide the question of when governmental agencies will receive immunity on the basis of either the purpose of the agency or the amount of control a foreign government has over that agency.²⁵² Three codifications of international law, one proposed by the International Law Commission of the United Nations,²⁵³ the United Kingdom's State Immunity Act,²⁵⁴ and the Council of Europe's European Convention on State Immunity,²⁵⁵ all provide immunity only for governmental agencies that perform a governmental purpose.²⁵⁶ Nationalized corporations and other state owned enterprises, even those directly owned by a government, do not expect special immunity protection anywhere in the western world, including the very countries where the corporations were formed, except in United States courts.

It has been suggested that section 1603(b) be amended to re-

251. Section 1603(b)(2)'s majority ownership requirement is unique, so that even without tiering, on the basis of direct government ownership of stock, the FSIA has a much broader scope of what fits the definition of a protected agency or instrumentality. See M.P.A. Kindall, Note, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commissioner's Draft*, 75 CAL. L. REV. 1849, 1860-61 (1987) (stating that the FSIA extends broader immunity than other codifications); see also Hoffman, *supra* note 15, at 584.

252. See Hoffman, *supra* note 15, at 551-65 (providing a comparative analysis of the FSIA's majority ownership provision with England, Switzerland, Germany, France, and Belgium); Dellapenna, *supra* note 250, at 54, 57, 59, 60 (providing an overall study of European sovereign immunity traditions and finding that England bases agency immunity on the existence of sovereign authority, France bases agency on the existence of a public nature, and Germany does not extend immunity to governmental agencies at all); Kindall, *supra* note 251, at 1849-50, 1861 (suggesting that generally, international law on foreign sovereign immunity is far from uniform; noting, however, that according to international standards immunity granted agencies and instrumentalities depends on purpose or control).

253. *Report of the Int'l Law Comm'n on the Work of its Forty-Third Session*, U.N. GAOR Int'l Law Comm., 43d Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991). Like the Restatements, the International Law Commission's draft is a codification of what the law should be rather than existing practice. See Kindall, *supra* note 251, at 1851. It has not been adopted yet by the United Nations General Assembly. See *id.* at 1888.

254. State Immunity Act, 1978, ch. 33, art. 5, *reprinted in* 10 HALSB. 757 (4th ed. reissue 1995).

255. European Convention on State Immunity, May 16, 1972, art. 27(2), Europ. T.S. No. 74, at 4, *reprinted in* 3 EUROP. CONV. & AGREE. 39 (1972-74).

256. See Kindall, *supra* note 251, at 1860-62 (comparing four codifications of international law: the Foreign Sovereign Immunities Act, the proposed draft by the United Nation's International Law Commission, the British State Immunity Act, and the European Convention on State Immunity and Additional Protocol, ratified by some but not all European states).

move the majority ownership requirement altogether.²⁵⁷ It is argued that by favoring these corporations the law penalizes not only United States plaintiffs but also our domestic corporations that must compete with these favored entities.²⁵⁸ An argument to eliminate the majority ownership requirement from the FSIA is beyond the scope of this Note.²⁵⁹ The unfair disparities in treatment that section 1603(b)(2)'s critics point to, however, are even more apparent when courts allow tiering. With tiering, the number of potential United States plaintiffs harmed increases proportionately with the number of potential foreign corporation defendants. Likewise, with tiering, preferential treatment given to foreign corporations impacts domestic corporations in direct proportion to the number of poten-

257. See Hoffman, *supra* note 15, at 565-66 (stating that the majority ownership requirement of section 1603(b)(2) is out of line with international practice). "No other country in the world has adopted state ownership as a basis for conferring sovereign legal status on commercial corporations." *Id.* at 565.

258. See Elizabeth Verville, *Amending the Foreign Sovereign Immunities Act*, 86 DEP'T ST. BULL. 73, 78 (1986) (stating that the State Department was examining whether truly commercial enterprises such as state-owned airlines should be removed from the FSIA); see also *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689, and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 67 (1987) (testimony of Mark B. Feldman, Comm. on Foreign Sovereign Immunity (sic) Act, American Bar Association, Section of Int'l Law and Practice) (declaring his belief that because most lawyers are unfamiliar with complexities of the FSIA, courts make many mistakes deciding FSIA cases; asserting that eliminating commercial corporations entirely would serve the public interest). See generally, Hoffman, *supra* note 15 (arguing against the inclusion of any commercial state owned corporations within the FSIA, regardless of whether state ownership is direct or indirect).

259. This Note argues only against allowing tiering within the FSIA, the extension of section 1603(b)'s majority ownership requirement to all subsidiary corporations with ownership that can ultimately be traced to a foreign state. Congress intentionally enlarged the scope of traditional foreign sovereign immunity with section 1603(b). See *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 688 (S.D.N.Y. 1996). Furthermore, section 1603(b) creates a bright-line, predictable measure of which corporations qualify for FSIA protections and avoids case-by-case determinations based on arguments of control. See *supra* Part I.C.1 for a discussion of congressional goals in enacting the FSIA. It is important to remember that once within the FSIA, these entities uniformly fall within the commercial activity exception of section 1605(a)(2). See 42 U.S.C. § 1605(a)(2) (1994). See *supra* Part I.C.2 for a procedural explanation of the FSIA. Thus it is only the procedural benefits and not total immunity, which the FSIA grants these entities.

However, if the arguments against extending any immunity benefits to commercial enterprise which are directly owned by a foreign state are compelling, how much more compelling are the arguments against extending immunity benefits to subsidiary corporations in multi-tiered enterprises with only indirect foreign state ownership. The bright line disappears as issues of control are argued, and predictability for American plaintiffs vanishes. See *supra* Part III.B.2 for an argument that tiering is contrary to congressional goals in enacting the FSIA.

tial foreign corporations. With tiering, the United States' already generous immunity treatment is further removed from international practice at a direct cost to private and corporate Americans.

When United States courts allow tiering, then, courts grant foreign-government-owned corporations immunity protections that are uniformly denied to them elsewhere, at a cost to United States plaintiffs and domestic commercial corporations. Congress enacted the FSIA to bring the United States' foreign sovereign immunity policy into line with international practice.²⁶⁰ A requirement of direct foreign government ownership for commercial corporations to qualify for foreign state status allows the United States policy to better conform to prevailing standards of international law.²⁶¹

CONCLUSION

In 1976, Congress was acutely aware of the unfair situation that faced a United States plaintiff who had a claim against a foreign state, but had little way of knowing how, when, or if that claim would be heard in court.²⁶² "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states."²⁶³ In 1976, Congress found a pressing need to protect the rights of American citizens against the increasing number of foreign corporations. This need is especially evident today, when our world economy, in a way perhaps never contemplated by Congress twenty years ago, is dominated by multinational corporations with "pyramidal, multitiered corporate structures."²⁶⁴

Tiering of indirect ownership interests should not be allowed under the Foreign Sovereign Immunities Act. When courts allow tiering they extend immunity benefits where Congress never in-

260. See *supra* Part I.C.1; see also 1976 Hearings, *supra* note 11, at 33 (testimony of Monroe Leigh, Legal Adviser, Department of State) (responding negatively when asked whether any provisions in the FSIA were significantly different than immunity treatment in other commercially developed nations). Congress enacted the FSIA to respond to the unequal treatment United States corporations received in courts abroad, especially in Europe after World War II. See *supra* Part I.B.2 for a discussion of the unequal treatment U.S. owned corporations faced abroad that led to the enactment of the FSIA.

261. See Hoffman, *supra* note 15, at 551-65, 565 n.149 (outlining the "separate entity" rule as it is used in Western European countries today and stating that no other country has a rule comparable to section 1603(b), nor do any international law organizations advocate foreign state status based on ownership).

262. See H.R. REP. NO. 94-1487, at 6-7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

263. *Id.* at 6, reprinted in 1976 U.S.C.C.A.N. at 6605.

264. BLUMBERG, *supra* note 1, at 8.

tended, as evidenced most strongly by the FSIA's purpose in protecting government instrumentalities compared to a realistic look at the types of corporations claiming immunity protection under section 1603(b). The current circuit split on this issue is a source of great interest to foreign corporate conglomerates.²⁶⁵ The average United States citizen, on the other hand, is unaware that the issue of tiering even exists. However, the resolution of the issue of whether the FSIA allows tiering of corporate subsidiaries will have major consequences for the vast number of United States citizens who are employed by, are harmed by, or do business with, sometimes unknowingly, a corporation with partial and indirect ownership ties to a foreign state.

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265. See Michael M. Baylson & Clare Ann Fitzgerald, *Courts Disagree on the Extent to Which the Foreign Sovereign Immunities Act Permits Pooling of Interests and Tiering of Subsidiaries by Foreign Governments*, NAT'L L.J., Feb. 3, 1997, at B7; Darryl van Duch, *When Does a Sovereign State Control a Company?*, NAT'L L.J., Apr. 1, 1996, at B1; John Fellas, *Tiering of Ownership Interests Under the FSIA*, N.Y. L.J., Apr. 8, 1997, at 1.