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Tiered Entities and Sovereign Privileges
Under the Foreign Sovereign Immunities Act

INTRODUCTION

Sovereign immunity originated in an age when the ruler, who was identified with the state, "was above the law" and "claims of individuals were sacrificed in the national interest."1 Traditionally, foreign immunity extended to foreign public property2 and state-owned commercial property,3 but not to state-owned corporate entities.4 As foreign governments increasingly competed in commercial activities,5 courts sometimes extended immunity to a state-owned corporation's public activities,6 but not to a government's commercial activities.7

Such distinctions left litigants with "no firm standards" as to when a valid assertion of sovereign immunity was appropriate. In 1976, Congress enacted the Foreign Sovereign Immunities Act (the "FSIA" or "the Act") to provide remedial procedures that would balance the rights of American plaintiffs against those of foreign state entities. In general, Congress intended the Act to codify the "restrictive" theory of sovereign immunity via the commercial activity exception. Yet, in a departure from traditional practice the Act confers state status upon foreign-owned corporations, unless certain exceptions apply.

The Act grants state status upon any "agency or instrumentality of a foreign state." Section 1603(b) defines an "agency or instrumentality of a foreign state" as any entity:

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

(1965).
9. 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (1994) [hereinafter "the FSIA" or "the Act"].
10. "The purpose of the proposed legislation ... is to provide when and how parties can maintain a lawsuit against a foreign state or its entities ... and to provide when a foreign state is entitled to sovereign immunity." H.R. REP. NO. 94-1487, at 6. Prior to the Act there were no "comprehensive provisions" to inform parties when they could assert a legal claim in court against a foreign state. Id. at 7.
11. The restrictive theory differentiates between governmental activities (jure imperii) and commercial activities (jure gestionis). Foreign sovereigns are immune from claims based on jure imperii acts while jure gestionis acts do not generate immunity. See generally GORDON, supra note 5, § 4.01, at 4-3 to 4-4 (explaining the adoption of the restrictive theory by the State Department when making immunity request to the courts). The House Report states "the immunity of foreign states is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R. REP. NO. 94-1487, at 7. See infra text accompanying notes 47-48.
12. 28 U.S.C. § 1605(a)(2). A foreign sovereign will not be extended immunity if the "action is based upon a commercial activity . . . ." Id.
15. 28 U.S.C. § 1603(a) states: "(a) A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."
16. 28 U.S.C. § 1603(b)(1)-(3) (emphasis added). While courts have generally applied § 1603 to entities, they have applied it to an individual acting in an official capacity. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990). Courts have also applied § 1603 to an international organization. International Ass'n of
Under § 1603(b), courts have permitted vertically removed corporations having “tiered” ownership interests to claim foreign state status. “Tiering” has allowed remote corporations competing in the commercial sector to gain either of two distinct advantages: immunity or the procedural benefits of the FSIA.


19. See infra notes 53-81 and accompanying text.
In *Gates v. Victor Fine Foods*, Albert Pork, a Canadian government supported entity, owned Fletcher’s Fine Foods (“FFF”), a Canadian pork processing plant. FFF in turn owned Golden Gate Fresh Foods (“GGFF”), a pork processing plant located in California. Former employees of GGFF brought suit relating to their termination and cancellation of benefits against GGFF, FFF, and Alberta Pork. Alberta Pork and FFF claimed immunity under § 1603. The Ninth Circuit became the first circuit to hold that an entity (FFF) owned by a foreign agency (Alberta Pork) was not entitled to FSIA protection.

The *Gates* decision’s importance increases as more American individuals and businesses encounter foreign entities. States utilize multitudinous ownership interests to protect national industries, promote commercial products, fill market voids, raise capital, and support political ideologies. Even with the recent popularity of privatizing government entities, state-owned entities continue to be “regular participants in commercial markets.” The organizational matrix of such entities has risen in complexity and configuration. Consequently, tiering disputes “will become increasingly commonplace as more U.S. industries go global.” Tiering, moreover, may place United States manufacturers at a “competitive disadvantage” if their competitors can get “FSIA removal and jury immunity, while they cannot.”

This Comment argues that the language and policies of the FSIA do not support tiering. Part I reviews the evolution of foreign state immunity within the United States. Part II discusses benefits conferred by the FSIA and analyzes the policies supported by the Act and by the doctrine of foreign sovereign immunity. Part III discusses recent case developments regarding tiering, in particular the *Gates* decision. Part IV analyzes § 1603 and argues that the *Gates* court properly ruled against tiering. Part V recommends that courts should interpret the definition of a “foreign state” in light of the history and policies of foreign sovereign


23. *Id.*
immunity. Part V also recommends that the legislature amend § 1603 to properly implement their original purpose, the codification of the restrictive theory.

I. THE EVOLUTION OF IMMUNITY

A. The Absolute Immunity Doctrine

Within the United States, foreign sovereign immunity evolved from the 1812 Supreme Court case, *The Schooner Exchange v. McFaddon*.24 The unanimous Court held that a French warship within United States waters was immune from libel and arrest, notwithstanding the American plaintiffs’ claim that it had been pirated from them on the high seas.25 Although the issue of immunity involved a government warship, Chief Justice Marshall acknowledged a distinction between public and private sovereign acts. Chief Justice Marshall stated:

Without indicating any opinion on the question...there is a manifest difference between the private property of the person who happens to be a prince, and the military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction.26

Nevertheless, in *Berizzi Bros. Co. v. Steamship Pesaro*27 the Supreme Court quickly noted that the difference between a government warship

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24. 11 U.S. (7 Cranch) 116 (1812).
25. *Id.* at 147. Chief Justice Marshall stated:
One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
*Id.* at 137.

27. 271 U.S. 562, 573-74 (1926).
and merchant ship was "not of special significance." In the libel in rem action, the Court extended immunity to a commercial merchant ship owned by the Italian government. Thus, the Court confirmed the "absolute rule of state immunity." A foreign state and its property would be immune from jurisdiction, absent its consent. The Court reasoned that a country's public acts included "advancing the trade of its people," "producing revenue for its treasury" and "maintaining and advancing the economic welfare of a people." 28

B. The Separate Entity Doctrine

Twelve years after the Schooner Exchange, the Supreme Court established the separate entity rule in Bank of the United States v. The Planter's Bank of Georgia, that state-owned corporations are discrete personalities that can not claim sovereign status based upon their sovereign owners. In Planters, the bank asserted that its state stock ownership vested Eleventh Amendment immunity rights. In refusing the bank's assertion, Chief Justice Marshall stated:

The Planter's Bank of Georgia is not the State of Georgia, although the State holds an interest in it. 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 transactions of that company, of its sovereign character . . . it descends to a level with those with whom it associates itself . . . 34

Nearly 100 years later, the New Jersey Superior Court in Molina v. Commission Reguladora Del Mercado De Henequen applied the separate entity doctrine in the international context. Conceptually, courts viewed a foreign corporation as having "its own independent juridical personality" whose "business and purpose was private." Courts

28. Id. at 573. (statement refers to The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, which the Court had extensively quoted).
32. Planter's Bank, 22 U.S. at 907.
33. Molina v. Commission Reguladora Del Mercado De Henequen, 103 A. 397, 399 (N.J. 1918) (stating that it's a "startling" proposition that defendant corporation of the State of Yucatan be granted immunity).
denied immunity to corporations closely controlled by foreign states,\textsuperscript{37} corporations partly operating in a governmental capacity,\textsuperscript{28} and to corporations that contributed to the wealth of the foreign state.\textsuperscript{39} In \textit{The Beaton Park},\textsuperscript{40} the court noted that foreign state-owned corporations should not be treated more favorably with respect to sovereign immunity than our own Government.\textsuperscript{41}

\textsuperscript{37} Coale v. Societe Co-Operative Suisse Des Charbons, 21 F.2d 180, 181 (S.D.N.Y. 1921) (holding foreign state-owned corporation not immune even though seven out of 17 directors were appointed by the government; the charter, amendments, and rules were to be approved by the government; and partial profits were paid to the government); United States v. Deutshes Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929) (holding corporation not immune even though it had a government controlled board, and France owned eleven-fifteenths of its capital stock).

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} 65 F. Supp. 211 (W.D. Wash. N.D. 1946).

\textsuperscript{41} Id. at 212.

In this country ... when our Government enters upon an ordinary commercial business undertaking ... it does so under the same liabilities as private individuals ....

No sound principle of law or of international comity requires that the courts of this country treat a foreign government more favorably as to sovereign immunity than our own Government is treated by the courts.

C. The Restrictive Theory

Courts often considered the question of immunity as a "political rather than judicial matter." Dating back to The Schooner Exchange, the Executive Branch regularly made recommendations to the courts for or against immunity. Courts generally conceded to the Executive Branch's determination to confer immunity upon a corporation.

After World War II, American businesses interacted with state-owned entities "on a scale never dreamed of at the time of [The Schooner Exchange] decision." Americans increasingly sought the protection of the courts to resolve legal disputes arising from these encounters. In response to a suit, foreign governments often made diplomatic requests of immunity to the Department of State. The State Department re-examined its approach in recommending immunity because of "the growing role of state agencies in international trade . . . ." In 1952, the Tate letter expressed that the State Department would employ the restrictive theory when making recommendations of immunity to the courts. Sovereign acts that were jure imperii (public) would be recommended for immunity, but jure gestionis acts (private) would not.

42. Et Ve Balik Kurumu, 204 N.Y.S.2d at 974.
43. The Executive department filed a request in favor of immunity. However, Chief Justice Marshall did not consider the request in his opinion. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 118 (1812). In 1812, the Executive favored immunity because "foreign policy required amity with France in anticipation of warfare with its bitter enemy Great Britain." BADR, supra note 29, at 14.
44. Et Ve Balik Kurumu, 204 N.Y.S.2d at 974. See also, F.W. Stone Engineering Co. v. Petroleos Mexicanos of Mexico, 42 A.2d 57 (Pa. 1945) (ruling government of Mexico's profit generating commercial enterprise immune based upon State Department's recommendation). "Nor is it of any significance that the governmental instrumentality is a separate corporation. A determination by the Secretary of State with respect to the status of such instrumentality is . . . binding upon the courts of this country . . . ." Id. at 60. The Supreme Court relinquished international law in favor of foreign policy suggestions from the Executive Branch due to separation of powers. This practice reached its nadir in Ex Parte Republic of Peru, 318 U.S. 578 (1943) and Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).
47. 26 DEPT STATE BULL. 984 (1952) (writing from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952)).
48. See generally GORDON, supra note 5, § 4.02, at 4-5 to 4-10 (explaining the evolution of State Department's determination process into a quasi-judicial hearing that occasionally usurped the court's function). But see Michael H. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 HARV. L. REV. 608, 613-15 (1954) (asserting that the State Department should hold formal hearings).
Nevertheless, when foreign relations demanded, the State Department recommended immunity in disputes involving commercial acts and the courts abdicated.\textsuperscript{49} Courts also noted the difficulty in drawing the line between commercial and sovereign acts.\textsuperscript{50} The practice of deciding cases by either the State Department employing foreign policy considerations or the courts applying international law developed "considerable uncertainty" for private parties.\textsuperscript{51} This bifurcated arrangement resulted in an "incoherent body of rules claiming legal status, but manipulated for political ends, and lacking essential attributes of law, such as certainty, generality, and neutrality."\textsuperscript{52}

II. THE FSIA: PROCEDURAL PROTECTIONS AND POLICIES

A. Procedural Protections

The FSIA provides "comprehensive provisions" to inform parties when they can assert a legal claim against a foreign state.\textsuperscript{53} Previously, courts generally denied immunity to foreign state-owned corporations.\textsuperscript{54}

\begin{footnotesize}
\begin{enumerate}
\item See Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (recognizing immunity upon State Department's recommendation on behalf of commercial vessel two days after Cuba released hijacked American airplane); Ibrandtsen Tankers, Inc. v. President of India, 446 F. 2d 1198 (2d Cir. 1971) (granting immunity in breach of contract suit pursuant to the State Department's recommendation); Chemical Nat'l Resource, Inc. v. Republic of Venezuela, 215 A.2d 864, 877 (Pa. 1966) (granting immunity in breach of commercial contract dispute based on the State Department's recommendation); see also Hill, supra note 25, at 173-80 (asserting that restrictive theory is not closely followed in the majority of State Department decisions).
\item See Victory Tansport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359 (2d Cir. 1964) (noting some courts looked at the nature of the act, classifying those acts that could not be performed by private individuals as sovereign acts, while other courts examined the purpose of the act to determine if its objective was public in character).
\item H.R. REP. No. 94-1487, at 9 (1976). "The courts had begun to rely quite heavily on the practices and policies of the State Department and to place less emphasis on whether immunity was supported by the law and practice of nations, that is, international law." International Ass'n of Machinists v. Organization of Petroleum Exporting States, 477 F. Supp. 553, 565 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).
\item Hill, supra note 25, at 178. But see Michael H. Cardozo, Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper, 48 CORNELL L.Q. 461, 461-62 (1963) (asserting judicial deference acknowledges the Executive's right and does not surrender judicial responsibilities).
\item See H.R. REP. No. 94-1487, at 6.
\item See supra notes 33-41 and accompanying text.
\end{enumerate}
\end{footnotesize}
The FSIA, however, presumes state-owned corporations should be granted immunity, unless an exception applies. Even if an exception applies, the Act, by extending sovereign status beyond the state to corporations under § 1603, confers sovereign procedural privileges to commercial entities. Once qualified as an "agency or instrumentality" under § 1603(b), the Act "provides the sole basis for obtaining jurisdiction . . . ." Therefore, tiering majority ownership back to a foreign sovereignty becomes the preeminent task for any indirectly state-owned corporation.

For a litigant who unexpectedly opposes a tiered corporation, the Act's procedural maze can be insurmountable. First, once a corporation establishes prima facia evidence of immunity, the burden of proof shifts to the plaintiff to demonstrate that an exception applies.

57. See generally Hoffman, supra note 33, at 565-84 (critiquing § 1603's consequences of conferring sovereign status on commercial entities and its malalignment with international trends).
59. Cf. Gould, Inc. v. Penchiney Ugine Kuhlmann, 853 F.2d 445, 450 (6th Cir. 1988) (holding the time to determine whether a tiered corporation is a "foreign state" is the time of the act); but see Straub v. A.P. Geren, Inc., 38 F.3d 448, 451 (9th Cir. 1994) (ruling FSIA applicable if tiered corporation is a "foreign state" at time suit is filed, even if it was not state-owned at time of alleged wrong-doing); Ocasek v. Flinkote Co., 796 F. Supp. 362, 365 (N.D. Ill. 1992) (holding the time to determine whether a tiered corporation is a "foreign state" is the time of the suit). For changed status corporations, see generally Rebecca J. Simmons, Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act, 90 COLUM. L. REV. 2278 (1990).
60. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) (describing the FSIA as a "labyrinth . . . [with] numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions . . ."). "[T]he matrix of complex conditions has caused the FSIA to achieve the heights of confusion heretofore achieved only by the Internal Revenue Code." GORDON, supra note 5, § 4.03, at 4-26.
Then, the defendant entity must prove by a preponderance of the evidence that the exception does not apply.

Second, the Act provides special requirements for service of process upon a foreign agency or instrumentality. A plaintiff who fails to strictly comply with the service provision carries the burden of proving that he “substantially complied,” that the defendant received actual notice, and that the defendant was not prejudiced by the lack of compliance. Delivery of the complaint in the incorrect language fails the “substantial compliance” test.

Third, a tiered corporation gaining foreign state status can remove any civil action to federal court, at any time for cause shown. The action can be removed regardless of the presence of non-diverse defendants. Moreover, the Act’s time limitations for removal are more liberal than the requirements under federal question and diversity jurisdiction. Courts have permitted untimely removal to “provide a federal forum in the interest of comity.” One court permitted a tiered corporation to remove the case after four months. The FSIA also preempts claim-specific federal laws that prohibit removal. Cases removed to federal court proceed without a jury. Every court of appeals to consider the

63. 28 U.S.C. § 1608(b) (1994). Requirements for service of process upon a foreign state or a political subdivision of a foreign state are different than the requirements for service upon an agency or instrumentality. Id. § 1608(a).
64. Straub, 38 F.3d at 453-54.
65. Id. at 453.
67. Trump Taj Mahal v. Costuzioni Aeronautiche Geovanni, 761 F. Supp. 1143; 1146 (D.N.J. 1991), aff’d, 958 F.2d 365 (3d Cir. 1992), cert. denied, 506 U.S. 826 (1992). Removal is permissible “even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.” Id. See H.R. REP. NO. 94-1487, at 32.
71. Talbot, 835 F. Supp. at 355 (stating that 28 U.S.C. § 1445(a) which prohibits removal of civil actions brought in State court under the Jones Act does not preclude removal by a state-owned entity under the FSIA).
question has held that the Act’s prohibition against jury trials does not violate the Seventh Amendment.\(^73\)

Fourth, plaintiffs trying to gain jurisdiction over a corporate defendant under the commercial activity exception face additional hurdles.\(^74\) If the commercial activity\(^75\) occurred within the United States, the plaintiff must demonstrate a nexus between the defendant’s commercial activity and the claim.\(^76\) The claim must be “based upon” a commercial activity having “substantial contact with the United States.”\(^77\) Therefore, the nexus requirement may not be satisfied by “doing business” contacts under many long-arm statutes.\(^78\) If the commercial activity occurs outside the United States, the plaintiff must prove that the defendant’s actions caused a substantial “direct effect” on the plaintiff and that the “direct effect” occurred in the United States.\(^79\) There must be an “immediate consequence of the defendant’s . . . activity.”\(^80\) A corporate plaintiff who suffers “direct” financial hardship must “be


\(^75\) A foreign state’s activity is considered commercial if a private party could engage in a similar activity. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992).

\(^76\) 28 U.S.C. § 1605(a)(2) (1994); America West Airlines v. GPA Group, Ltd., 877 F.2d 793, 796-97 (9th Cir. 1989) (dismissing case after plaintiff failed to show that the defendant’s commercial activity was the basis of the suit); Gates v. Victor Fine Foods, 54 F.3d 1457, 1465 (9th Cir. 1995), cert. denied, 116 S. Ct. 187 (1995) (defendant Alberta Pork’s acts of selling hogs and owning subsidiary unrelated to former subsidiary employees’ claims concerning termination of benefits and employment).


placed in financial peril as an immediate consequence of the defendant’s unlawful activity.”

B. Policy Considerations

In the seminal case *The Schooner Exchange*, Chief Justice Marshall reasoned that a domestic state voluntarily extends immunity for policy reasons. The case law history of foreign sovereign immunity reveals various policy considerations. Also, the House Report concerning the FSIA enumerates four objectives the Act seeks to accomplish. The Act’s legislative history reveals policies underlying these objectives. The policies intertwined in foreign immunity and the FSIA support recent case rulings prohibiting tiering.

Foreign sovereign immunity effectuates “comity among nations and among the respective branches of federal government,” and “aid[s] in the maintenance of friendly powers.” The doctrine is implemented so as not to “embarrass the Government of the United States in its foreign relations” and to promote “public morality, fair dealing, reciprocal self-interest, and respect for the ‘power and dignity’ of the foreign sovereign.”

The House Report states the Act would accomplish four objectives: “codify the . . . restrictive principle;” transfer sovereign immunity decisions “from the executive branch to the judicial branch;” replace the need for in rem jurisdiction by providing a “statutory procedure” for in personam jurisdiction; and provide prevailing plaintiffs with a

84. Flota Martima Browning De Cuba v. Motor Vessel Ciudad De La Habana, 335 F.2d 619, 623 (4th Cir. 1964).
88. Id.
89. Id. at 8.
method to execute judgments against foreign states. These four objectives advance various policies.

First, the restrictive theory, by not extending immunity to commercial or private acts, encourages private transactions with foreign states by ensuring individuals that their disputes will be adjudicated in the courts. This implies that findings of "commercial liability against foreign states do not impede the conduct of foreign relations . . ." Second, the Act implements "procedures that insure due process" by transferring immunity determinations to the judiciary.

Third, the Act promotes "uniformity in decision" because of the undesirable repercussions of inconsistent decisions in cases involving foreign sovereigns. Original federal jurisdiction, the expanded time limitations for removal, the lack of minimum amount in controversy, and the prohibition of jury trials in federal court all promote uniformity by encouraging cases to be tried in federal court without a jury.

Synthesizing these competing concerns facilitates an analysis of "tiering" within the proper context. The primary policies to be balanced include a private litigant's right to due process versus a foreign sovereign's right to perform state activities free from the intrusion of a lawsuit. Also, the transfer of immunity determinations to the courts and a goal of uniformity indicate a desire for predictability. Finally, the judiciary "should not interfere with the conduct of the foreign policy of the United States . . ."

90. Id.
91. See supra note 11.
93. Id. at 698.
94. H.R. REP. No. 94-1487, at 7. The State Department "does not have the machinery to take evidence, to hear witnesses, or to afford appellate review." Id. at 8.
95. Id. at 13.
97. See supra notes 68-70 and accompanying text.
99. Id.
III. THE COURTS: INDIRECT OWNERSHIP OF TIERED ENTITIES

A. Who Owns Whom

Prior to Gates, courts have stated tiering to be "no problem"\(^\text{102}\) and "immaterial."\(^\text{103}\) The courts considered any "entity 50% or more of whose shares are owned by a foreign state is itself a foreign state."\(^\text{104}\) Courts disregarded a parent entity's nomenclature. Consequently, courts applied the FSIA to any foreign government majority-owned tiered entity.

Prior to Gates, the courts' analyses of whether § 1603 permits tiering have lacked substance. Rather their analyses essentially concerned uncovering ownership interests.\(^\text{105}\) In O'Connell Machinery Co., Inc. v. M.V. "Americana,"\(^\text{106}\) the appellant claimed the defendant, Italian Line, was "too remote" under § 1603. Istituto per la Ricostruzione Industriale ("IRI"), an Italian government financial entity directly controlled Societa' Finanziaria Marittima ("FINMARE"); FINMARE in turn owned a majority of Italian Line's shares.

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104. Linton v. Airbus Industrie, 794 F. Supp. 650, 652 (S.D. Tex 1992), appeal dismissed, 30 F.3d 592 (5th Cir. 1994), cert. denied, 513 U.S. 1044 (1994). In Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993), the issue of tiering was not in dispute. Nevertheless, Judge Greenberg believed that a "reasonable inference might be drawn that the term 'foreign state' in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state." Id. at 1285 n.12. He reasoned as follows:

[I]t can be argued reasonably that Congress by the inclusion of "political subdivision" and omission of "agency or instrumentality" in section 1603(b)(2) intended to distinguish between these types of entities, the inference being that the former but not the latter could own an entity which could be regarded as an agency or instrumentality of a foreign state.

Id.

105. See, e.g., Linton, 794 F. Supp. at 652. The court found defendant AI not to be a foreign state because only 49.25% of majority shares were held by foreign states; two corporations controlled by foreign states owning 42.1% of AI; a private corporation owning 20% of AI; a fourth corporation, Deutsche Airbus GmbH ("DA") owning the remaining 37.9% of AI, DA in turn owned by 2 companies, 20% owned by an agency of the German government and 80% owned by Messerschmitt-Bolkow-Blohm ("MBB"), a German corporation; foreign states owning 36.56% of MBB and 63.44% privately held.

Whether the court considered FINMARE an agency [not explicitly within § 1603(b)(2)] or a political subdivision of the Italian government [explicitly within § 1603(b)(2)] is far from clear. The court noted that the "Italian government saw fit to double-tier its ... agencies." Without any analysis, however, the court also stated that "FINMARE fits comfortably within this [political subdivision] definition." Without ever addressing the broader implications of tiering, the court simply traced the double-tiered state-majority interest. Thus, the court granted immunity to Italian Line even though the IRI "coordinate[d] the management of the commercial enterprises of the Italian Government." In *Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni*, the court appropriated O'Connell's tracing of ownership reasoning. An Italian state agency, Ente Partecipazionie Finanziamento Industria Manifatturiera ("EFIM"), owned and controlled MCS S.p.A. MCS S.p.A. wholly owned Aviofer Breda S.p.A. who in turn owned 98.9% of helicopter manufacturer Augusta S.p.A., the defendant. The plaintiff argued that the FSIA did not apply to Augusta S.p.A. because it was "too remote."

The court record stated that EFIM is a "state owned agency," MCS S.p.A. is a "financial operating company," and Aviofer Breda S.p.A. is a holding company. The court, nevertheless, failed to analyze whether § 1603 permitted tiering by agencies and instrumentalities. Instead, the court analogized Augusta's position to that of Italian Line in *O'Connell* and permitted this triple-tiered arrangement.

*America West Airlines, Inc. v. GPA Group, Ltd.* illustrates the courts' easy extension of state privileges. In *America West Airlines*, the court noted that defendants Aerlinte and Aer Lingus, "fall within the definition of a ‘foreign state’ under section 1603(a)" because they were wholly owned by the Republic of Ireland. Without discussion the court then treated a subsidiary of Aer Lingus (defendant Airmotive, an engine maintenance corporation) as a foreign state.

107. *Id.* at 116 (emphasis added).
108. *Id.* at 116-17.
109. *Id.* (emphasis added).
111. *Id.* at 1149-50 (emphasis added).
112. *Id.* at 1150.
113. 877 F.2d 793 (9th Cir. 1989).
114. *Id.* at 796.
The court’s reasoning in Rutkowski v. Occidental Chem. Corp.,115 emphasizes blind adhesion to tiering without considering the intermediate entity’s classification. In Rutkowski, the court noted that “Quebec did not own more than 50 percent of [defendant] ACL.”116 Yet, the court held ACL to be an instrumentality of Canada because Quebec wholly owned “a company (SNA) which owned 51.2 percent of a company (Mines-S.N.A.) which owned 54.6 percent of ACL,” an asbestos supplier.117

B. What Owns What

Litigants disputing an entity’s immunity status clash over § 1603(b)(2)’s “ownership clause.”118 In Gates, the Alberta Agricultural Products Marketing Council (“Council”) approved regulations issued by Alberta Pork, a marketing agent for hog producers. The Council also authorized the methods and matters that Alberta Pork could act upon, including Alberta Pork’s acquisition of FFF. Based upon the government Council’s “active supervisory role” over Alberta Pork, the court concluded that Alberta Pork was a “an agency or instrumentality of the Province of Alberta.”119

Although Alberta Pork wholly owned FFF, the court did not grant FFF foreign state status because FFF was “not owned by ‘a foreign state or political subdivision thereof . . .’.”120 The court stated:

116. Id. at *1 (emphasis added).
117. Id. (emphasis added).
118. Sections 1603(b)(1) and 1603(b)(3) are straightforward. See supra text accompanying notes 15-16.
120. Id. at 1461 (emphasis added). The Gates opinion did not mention two previous Ninth Circuit cases that permitted tiering, Straub v. A.P. Grein, Inc., 38 F.3d 448 (9th Cir. 1994) and America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989). In Straub, defendant corporation Atlas Turner was owned by a Crown Corporation of the Province of Quebec. The plaintiff did not argue that tiering was impermissible under the Act. The plaintiff did contend that Atlas Turner was not a foreign state because the corporation was not an instrumentality at the time of the acts giving rise to the suit. The court held that the FSIA did apply because Atlas Turner was acquired by a Crown Corporation prior to the time the lawsuit was filed. Straub, 38 F.3d at 451. See supra text accompanying notes 113-14, for a discussion of America West Airlines, Inc. v. GPA Group, Ltd.
One might argue that once we determine that Alberta Pork is an agency or instrumentality, then it ipso facto becomes a foreign state or political subdivision thereof. However, the literal language of the statute requires us to reject that argument. The statute [1603(a)] provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality. If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of section 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because 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."

The court further noted that the legislative history concerning § 1603(b)(2) also distinguishes a foreign state from a political subdivision. Accordingly, the Ninth Circuit’s interpretation of § 1603(a)-(b)(2) means that an entity whose majority interest is owned by a foreign state (or a political subdivision of a foreign state) will be granted foreign state status, but that the FSIA will not provide protection to an entity whose majority interest is owned by an agency or instrumentality of a foreign state or a political subdivision thereof.

By distinguishing between foreign states, political subdivisions, and agencies and instrumentalities, the court restricted the reach of § 1603. The court’s concern was that if an agency or instrumentality’s majority ownership interest conferred foreign state status on an entity, then immunity could be granted to “any subsidiary in a corporate chain, no matter how far down the line.”

The court in *Gardiner Stone Hunter Int’l v. Iberia Lineas Aereas De Espana, S.A.* followed *Gates*. Spain directly owned Iberia Lineas Aereas de Espana, S.A. ("Iberia"). Iberia controlled an eighty-five percent interest in defendant Aerolineas Argentinas. The court found Iberia, a corporate entity, not to be a foreign state or political subdivision. In determining that Aerolineas Argentinas was owned by an agency or instrumentality, the court stated: “[t]he interpretation of the Act and its legislative history set forth by the Court of Appeals for the Ninth Circuit in *Gates* is straightforward and persuasive.” Consequently, Aerolineas Argentinas did not satisfy § 1603(b)(2)’s ownership requirement. Like the Ninth Circuit, the *Gardiner* court was concerned about agencies and instrumentalities spreading potentially unlimited immunity throughout the corporate network.

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121. *Gates*, 54 F.3d at 1462.
122. Id.
123. Id.
125. Id. at 130.
C. Rejecting Gates’ Reasoning

Following Gates, passengers’ estates brought wrongful death actions after an airline crash near O’Hare International Airport in In re Air Crash Disaster Near Roselawn, Indiana (“Roselawn”). They sued the airline and related entities in state court. Avions de Transport, Regional, G.I.E (“ATR”), the plane’s manufacturer, removed the actions to federal court under § 1441(d) of the FSIA.

ATR claimed it was a “foreign state” based upon the following ownership structure: Societe Nationale Industrielle Aerospatiale (“SNIA”) owned fifty percent of ATR; SOGEPA owned twenty percent of SNIA and the French government owned one hundred percent of SOGEPA. The government also owned 52% of Credit Lyonnais which owned 17.81% of SNIA. The French government, moreover, directly owned 62.16% of SNIA. Alenia owned the other fifty percent of ATR. Alenia was a division of Finmeccanica S.p.A. which was sixty-two percent owned by I.R.I, a holding entity. The Italian government wholly owned I.R.I.

In Roselawn, the court explicitly rejected the Gates court’s reasoning point by point. First, the Roselawn court noted that a foreign state within § 1603(a) (titled “Definitions”) includes an agency or instrumentality. Second, the superfluous inclusion of political subdivisions in § 1603(b)(2) did not necessarily lead to the exclusion of “agencies and instrumentalities” within the meaning of a foreign state. Third, the court noted that the legislative history concerning § 1603 states that only in § 1608 does “the term ‘foreign state’ refer[] only to the sovereign state itself.” The court believed that Congress did not intend the term “foreign state” in the very next section to mean only the sovereign state itself as the Gates court interpreted the section. Finally, the court asserted that judicial concern about expanding immunity down the corporate chain should be left to the legislature.

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126. 909 F. Supp. 1083 (N.D. Ill. 1995), aff’d, 96 F.3d 932 (7th Cir. 1996).
127. Id. at 1087. ATR also “pooled” ownership interest because neither the French nor Italian government owned a majority interest. Id. at 1090-93.
128. Id. at 1095 (quoting H.R. REP. NO. 94-1487, at 15 (1976)).
129. Id. at 1094-96.
IV. ANALYSIS OF TIERING

A. Foreign States, Political Subdivisions, Agencies and Instrumentalities Within the Language of the FSIA

The threshold question concerning the application of any FSIA provision is whether an entity is a foreign state as defined by § 1603. The FSIA applies to entities that are owned by foreign states, but it does not "apply to entities owned by entities which are not foreign states." Thus, the issue concerning tiering is whether an agency or instrumentality of a foreign state is a foreign state.

Section 1603(a) defines a "foreign state, except as used in section 1608 of this title, [as] includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Section 1603(b)(2) defines an agency or instrumentality of a foreign state as an entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares ... is owned by a foreign state or political subdivision thereof ...." Dovetailing the two definitions, a "foreign state" within § 1603(b)(2) apparently includes an agency or instrumentality of a foreign state.

Consequently, courts have perceived majority state-owned intermediate companies as agencies or instrumentalities of foreign states (their parent companies) and as foreign states themselves for agencies and instrumentalities (their subsidiaries). This perception has greatly expanded potential immunity and the Act's procedural benefits. Remote entities, competing in common commercial activities, can bootstrap tenuous stacks of ownership interests back to sovereign states.

However, one can only equate an "agency or instrumentality of a foreign state" with a "foreign state," as the Roselawn court did, through circular reasoning. An "agency or instrumentality of a foreign state" would mean any entity a majority of whose shares or other ownership interest is owned by an "agency or instrumentality of a foreign state." Section 1603(b)(2) would define itself. Paring the section to its minimum shows the unreasonableness of this position. A foreign state would not be needed to confer foreign state status; § 1603(b) could

134. See Roselawn, 909 F. Supp. at 1096.
be interpreted as an "agency or instrumentality of an agency or instrumentality."

In addition, the phrase "or political subdivision thereof" in § 1603(b)(2) indicates that agencies and instrumentalities are not foreign states. The conjunction "or" between "foreign state" and "political subdivision thereof" reasonably indicates Congress wanted to identify the alternative discrete groups that emanate foreign state status.135 This interpretation makes the phrase "political subdivision thereof" completely necessary rather than superfluous.136 In light of the underlying policies, the Gates approach is clearly preferred to the circular reasoning of the Roselawn court.

As the Roselawn court noted, § 1603 and the pertinent legislative history indicates that the word "foreign state" refers to the sovereign state itself only in § 1608. However, the Act itself indicates otherwise. The Act utilizes the terms "foreign state," "political subdivision of a foreign state," and "agency or instrumentality of a foreign state" in various syntactic modes. The Act employs the term "foreign state" solely,137 with references to § 1603,138 with references to "political subdivisions"139 or "agencies and instrumentalities,"140 or with references to both.141

Section 1391(f) begins by specifically stating that the term "foreign state" means "a foreign state as defined in section 1603(a)."142 Section 1391(f) contains four enumerated clauses concerning venue. On the one hand, § 1391(1)-(2) treats the three groups identically. Under clause one, the plaintiff may bring an action in any district in which "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated."143 Under clause two, a plaintiff may bring a claim where "the vessel or cargo of a foreign state is situated . . . ."144

136. See Gates, 54 F.3d at 1462.
137. 28 U.S.C. §§ 1605(a)(1)-(2) & 1607.
138. 28 U.S.C. §§ 1330(a), 1391(f) & 1441(d).
140. 28 U.S.C. § 1605(3) & 1606.
141. 28 U.S.C. § 1608(d)-(e).
On the other hand, § 1391(f)(3)-(4), treats the three groups differently. Section 1391(f)(3) states that a civil action may be brought "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business . . . ."\(^{145}\) Section 1391(f)(4) states that a civil action may be brought "in the United States Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof."\(^{146}\) This clause contains the identical wording as the ownership clause in § 1603(b)(2).

One should not interpret the term "foreign state" in § 1391(f)(4) as including "an agency or instrumentality of a foreign state" because every word after "Columbia" would become superfluous. Furthermore, Congress clearly did not have this intent. The legislative history states that § 1391(f)(4) is limited to the foreign states and their political subdivisions because that is where they "have diplomatic representatives and where it may be easiest for them to defend."\(^{147}\) The only reasonable interpretation is that the word "foreign state" means the sovereign state itself. Likewise, the Gates court reached a similar reasonable interpretation after examining an identical phrase under § 1603(b)(2). The Act repeatedly regards an "agency or instrumentality" less favorably than a "foreign state." The exception to jurisdictional immunity of a foreign state is more narrow than that of an agent or instrumentality when the issue involves "rights in property taken in violation of international law."\(^{148}\) Also, a foreign state, unlike an agency or instrumentality, is not liable for punitive damages.\(^{149}\) Under § 1608, if no special arrangement exists, a plaintiff must serve a foreign state according to strict international standards or through diplomatic channels.\(^{150}\) A litigant can serve an agency or instrumentality of a

\(^{147}\) H.R. REP. No. 94-1487, at 32 (1976).
\(^{148}\) 28 U.S.C. § 1605(3). The courts have jurisdiction over a foreign state when rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

\(^{149}\) 28 U.S.C. § 1606. "[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . . ." \(^{Id.}\)

foreign state through less formal manners. Finally, a court can attach property used by a foreign state for a commercial activity if it “is or was used for the commercial activity upon which the claim is based . . . .” However, an agency or instrumentality of a foreign state engaged in commercial activity in the United States may have its property attached “regardless of whether the property is or was used for the activity upon which the claim is based.”

Such dissimilar treatment throughout the Act indicates the term “foreign state” often refers solely to the sovereign state itself. Congress did not intend to equate an “agency or instrumentality of a foreign state” with a sovereign state. Additionally, the legislative history concerning § 1603(b)(2) states 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).” Because the term “political subdivision” is expressly used and agencies and instrumentalities generally do not have political subdivisions, “foreign state” as used in § 1603(b)(2) reasonably means only the sovereign state itself. Therefore, an agency or instrumentality should derive foreign state status only from a foreign state or a political subdivision thereof and not from other agencies or instrumentalities.

B. The Privileges of States

Congress intended to protect foreign sovereigns engaged in public acts from territorial jurisdiction by enacting the FSIA. Congress further intended to prevent adverse foreign policy repercussions by extending the procedural benefits to foreign states engaged in commercial acts. However, the Act also presumes agencies and instrumentalities, regardless of the nature of their acts, are foreign states. Consequently, many courts have granted the Act’s procedural benefits to tiered entities. Moreover, when a plaintiff fails to meet the Act’s procedural hurdles courts often grant immunity to tiered entities. Thus, the reasons for the

151. 28 U.S.C. § 1608(b).
155. See supra notes 102-17 and accompanying text.
156. See supra note 61.
Act’s preference for expanding state privileges must be discovered to determine whether they currently support the Act’s policies.

Section 1603(b) is an awkward artifact of outdated American perceptions of organizational enterprise and government. Its overinclusive structural approach mistakenly attempts to eliminate unequal treatment among entities from various foreign states due to a state’s internal structure of government and enterprise. The vestigial view that juristic persons carry out state purposes resulted from the socialist form of state enterprise and many European countries’ use of state corporations to rebuild after World War II. However, this fixation on structure at the expense of function unnecessarily provides tiered entities privileges previously not enjoyed under customary international law or often even in their own countries. Accordingly, conferring state status on tiered entities does not support foreign sovereign immunity policies.

Unfortunately, courts have permitted tiering to support foreign policies which are inappropriate for remote entities. As previously asserted, the courts’ perception that an entity remotely emanating from the state represents the state itself is a fallacious view. Tiered entities mingle in the marketplace like private parties. Consequently, a suit upon such an entity would hardly acerbate a sovereignty’s “national nerves.” Considering that the largest group of defendants under the FSIA consists of agents and instrumentalities, “one has to search carefully for


159. See Bettwy, supra note 157, at 230. In discussing this anomaly Mr. Feldman, who assisted drafting the FSIA states: “The drafters made a mistake by bringing state-owned enterprises within the scope of the FSIA.”


The importance of preserving the immunity of sovereigns in order to preserve the independence of states, the obligation of a sovereign not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, the perfect equality and absolute independence of sovereigns, the common interest impelling them to mutual intercourse and interchange of goods and services with each other, are the underlying reasons for immunity of sovereigns, as stated by Chief Justice Marshall. None of these reasons are applicable to a commercial corporation, even though it may be a governmental agency.


162. GORDON, supra note 5, § 6.13, at 6-40.
cases where the dignity of the foreign state would be offended were immunity from jurisdiction to be denied."

C. The Rights of Private Parties

Prior to the FSIA, courts sacrificed a private litigant's rights in the interest of foreign policy. While the Act proposed to balance these competing interests, § 1603's overinclusiveness continues to disadvantage private parties. Tiering foregoes the private litigants' concerns for procedural justice without achieving the Act's purpose of protecting and benefiting only foreign sovereigns.

Jurisdiction over a corporate entity does not confer jurisdiction over the state because courts exercise a presumption of separateness. An entity's acts will "normally" not be attributed to the sovereign state. Tiered entities have an undeniable independence from indirect state owners. In fact, an entity's independence provides critical advantages over government bureaucracies. The corporate structure eliminates or minimizes the need for direct state control. Instrumentalities offer flexibility, market-focused management, and efficiencies. Instrumentalities act like private entities, compete with private entities, and are treated like private entities in the marketplace.

Plaintiffs may treat indirectly state-owned entities like private companies for several reasons. First, when a plaintiff encounters a corporation, it may not be state-owned. Second, the costs to determine all owners may be prohibitive for low-probability events. Such costs rise in a world populated with multi-layered enterprises, temporary strategic alliances, boundaryless companies, and outsourcing. Third, a plaintiff may reasonably believe an entity can be sued like other private parties because it is in fact a separate legal personality. Fourth, a plaintiff may not realize that the FSIA preempts other statutes that

163. Id. § 1.01, at 1-3.
165. See supra note 59.
166. Efficient airline passengers will not seek out all entities involved in the manufacture, maintenance, and flight of their plane. See In re Air Crash Disaster Near Roselawn, 909 F. Supp. 1083 (N.D. Ill. 1995), aff'd, 96 F.3d 932 (7th Cir. 1996).
Finally, an indirectly state-owned entity may initiate the encounter leaving a plaintiff no “real” choice but to transact with the foreign entity.

In summary, courts, foreign states, and plaintiffs generally regard tiered entities as separate legal personalities. However, the courts’ strict adherence to tiering, regardless of an owner’s nomenclature, prohibits them from distinguishing between the entity and the state. Once courts fuse the two, foreign immunity policies override the plaintiff’s concerns for due process and fairness. Courts, therefore, need to differentiate subsidiary entities from parent owners and determine whether each is a foreign state, political subdivision, or an agency or instrumentality. Prohibiting tiering by agencies and instrumentalities will prevent nonexistent foreign policy concerns from providing tiered entities with unwarranted protections to the plaintiffs’ detriment.

**D. International Impact**

Courts treat American corporate defendants in the United States less favorably than tiered foreign entity co-defendants claiming state status. Foreign courts treat American entities acting abroad less favorably than American courts treat foreign entities acting here. This results from § 1603(b)’s structural approach; a government’s majority stock status confers state status. Structural based tiering places American courts at odds with international practices.

England’s State Immunities Act of 1978 presumes immunity does not attach to separate entities. A separate entity can overcome this presumption by demonstrating that the act was sovereign in nature.

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168. Workers may not have any meaningful choice but to continue to work when a foreign entity purchases their employer. See Gates, 54 F.3d at 1459.

169. Cf. Friedman, supra note 158, at 485. “[C]ourts and writers . . . have all too often failed to recognize that the substitution of a public corporation for the government itself in international transactions offered an opportunity to avoid the obstacle of government immunity or other traditional privileges attached to government activities in international law.” Id.

170. See Hoffman, supra note 33, at 554-65 (noting a trend away from status in Western European countries).

171. Section 14(1)(c) of the State Immunities Act of 1978 states that a “state” does not include “any entity (hereafter referred to as a ‘separate entity’) which is distinct from
Thus, structure is important to deny immunity while function is important to provide immunity. Pakistan, Singapore, and South Africa take a similar approach. Also, Germany generally denies immunity to separate entities and France follows a functional approach, examining the act rather than the entity's structure. In addition, the European Convention on State Immunity takes the position of non-immunity for separate juridical entities unless a "sovereign activity" gives rise to the suit.

Prohibiting tiering, as the *Gates* court did, furthers the Act's goal of aligning American practices with international practices. Alignment establishes a base upon which a framework of uniformity, predictability, and cooperation in international trade and investment can take place. Furthermore, it promotes fairness by sacrificing the rights of plaintiffs in American courts no more than they would be in foreign courts.

E. Separation of Powers

Much has been written about the courts intrusion into foreign policy matters via their interpretation and application of various sections of the FSIA. By contrast, until *Gates*, courts applied § 1603(a)-(b)(3) in a rote mechanical manner. Nevertheless, courts following the *Gates* interpretation and application will still refrain from encroaching upon the executive organs of the government of the State and capable of suing or being sued." Section 14(2) continues: "A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if (a) the proceedings relate to anything done by it in the exercise of sovereign authority . . . ." State Immunities Act, 1978, §§ 14(1)(c)-(2)(a) (Eng.), reprinted in *GORDON*, supra note 5, at Appendix C.


174. Dellapenna, supra note 165, at 61. The European Convention on State Immunity was ratified by Austria, Belgium, Cyprus, Luxembourg, the Netherlands, Switzerland, and the United Kingdom. Id. at 60.

175. See generally Jack I. Garvey, Judicial Foreign Policy-making in International Civil Litigation: Ending the Charade of Separation of Powers, 24 LAW & POL.'Y INT'L BUS. 461 (1993). For an analysis of how courts should implement a separation of powers approach when interpreting the FSIA's commercial activity exception, see Connors, supra note 101.
Executive’s power. There is no reason to suppose that tiering disputes will concern major foreign policy issues.\textsuperscript{176}

However, if a tiering case involves sensitive foreign policy implications the executive can file an amicus brief along with affidavits from the proper state officials. Courts have thoroughly considered statements of interests from the Executive Branch.\textsuperscript{177} In \textit{National Petrochemical Co. v. M/T Stolt Sheaf},\textsuperscript{178} the Executive Branch filed a statement of interest requesting that NPC, a subsidiary of a wholly owned corporation of Iran, have access to the courts. Likewise, the Executive Department can provide the court with a statement of interest when foreign policy dictates that an indirectly owned agency or instrumentality be treated as a foreign state. It must be remembered, however, that Congress transferred immunity determinations to the judiciary to remove political influences.\textsuperscript{179}

\section*{F. Domestic Impact}

Domestic immunity originates from different theoretical grounds than foreign immunity.\textsuperscript{180} Nevertheless, in practice, domestic immunity decisions have provided guidance to some courts when they resolved

\begin{itemize}
\item \textsuperscript{178} National Petrochemical Co. v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988), \textit{cert. denied}, 489 U.S. 1081 (1989) (the United States did not formally recognize the government of Iran at the time).
\item \textsuperscript{179} See \textit{supra} note 94 and accompanying text.
\item \textsuperscript{180} See \textit{supra} note 41.
\end{itemize}
foreign immunity questions. In domestic cases, courts have recognized that Americans' displeasure towards government immunity has led Congress to regularly make United States' entities amenable to suit.

Tiering ironically provides indirectly state-owned foreign entities with greater legal protection in U.S. courts than is given to directly-owned U.S. government entities. Also, foreign entities often are amenable to suit in their own countries. Accordingly, sovereign immunity policies do not justify such disparate treatment. Prohibiting tiering would accord similar rights to plaintiffs whether they are suing an American government-owned entity or a foreign state-owned entity.

V. RECOMMENDATIONS

In considering recommendations, one must keep an important point in mind: immunity is the exception and not the norm. Examined in this context, tiering presents two distinct problems. First, if a plaintiff fails to meet the Act's procedural hurdles a tiered entity will be granted immunity regardless of the nature of its activities. Second, and more importantly, while a remote entity will normally not be granted immunity because of the Act's commercial activity exception, it does gain the Act's procedural benefits simply because of its tiered ownership structure.

This Comment proposes two recommendations. First, as long as § 1603(a)-(b)(3) remains intact, courts should interpret tiering cases within the historical context of sovereign immunity. Second, the legislature should amend § 1603(a)-(b)(3) to focus less on structure. The Gates and Roselawn decisions highlight the absurdity of relying on tiered ownership to implement the restrictive theory. The Legislature should amend § 1603 to focus either on control or function.

184. Cf. William H. Reeves, The Foreign Sovereign Before United States Courts, 38 FORDHAM L. REV. 455, 456 (1970) (U.S. individuals and corporations should have the same rights against foreign governments as it does against our own government when actions involve contract and tort damage).
A. Historical Context

Pre-FSIA immunity history (both domestic and foreign immunity) reveals that courts continually refused to extend a sovereign’s immunity to separate legal entities. The Act’s legislative history also reveals that Congress intended to codify the restrictive theory. Under the restrictive theory, a defendant’s acts and not its structure are determinative in conferring state status. In this context, one views the Gates decision not as an aberration, but rather in sync with legislative intent and pre-FSIA case law history.

Courts need to examine tiering disputes not only with knowledge of the Act’s applicable statutes, but also with an understanding of the history of immunity. The Supreme Court acknowledged the importance of this history in Republic of Argentina v. Weltover, Inc. The Supreme Court recognized that § 1603(d)’s definition of “commercial activity” does not in fact define the term. The Court stated that “[f]ortunately . . . the FSIA was not written on a clean slate.” The Court then interpreted the meaning of “commercial activity” within the context of the restrictive theory.

Courts should advance the restrictive theory by prohibiting tiering under § 1603(b). Codifying the restrictive theory is the Act’s first objective. By implementing the Act, Congress did not intend to change immunity policy, but rather continue the policy articulated in the Tate letter. Unfortunately, the Act’s definitional clause fixes the threshold question on status for agencies and instrumentalities. Yet, courts have recognized that Congress “has the power to decide what the policy of the law shall be, and . . . that will should be recognized and obeyed.” Courts should uphold congressional intent by reading § 1603(b)(2) narrowly as the Gates court did. The independent and remote nature of tiered entities diminishes the risk of affronting the

186. Id. at 612.
187. See supra note 87 and accompanying text.
188. Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).
189. See Hyatt Corp. v. Stanton, 945 F. Supp. 675, 686-90 (S.D.N.Y. 1996). The Hyatt court found neither Gates nor Roselawn interpretations of § 1603(b)(2) dispositive. Consequently, the court inferred congressional intent from the following factors: (a) the prevailing international rule and earlier United States cases; (b) Congress’s explicit inclusion of entities owned by foreign states and political subdivisions; (c) a broad interpretation would extend state status to remote entities removed from state control; and (d) the substantial implications of tiering. Consequently, the court concluded that “Congress intended a narrow interpretation of ‘agency or instrumentality,’ i.e., that corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states are not themselves agencies or instrumentalities.” Id. at 688.
foreign sovereignty. Tiering reduces the likelihood that the United States' foreign policy and international trade interests will be embroiled in the action. Lacking an amendment, only agents and instrumentalities directly owned by sovereign states and their political subdivisions should be presumed to be performing acts political in nature.

B. Structure, Control, and Function

Section 1603(b), and tiering in particular, acts as a poor proxy for state control by solely focusing on structure. Even for all its length, the Roselawn analysis breaks down into whether "the structure of ownership interests . . . can support . . . foreign state status." This Comment proposes two possible amendments to § 1603. Both attempt to balance the three parties' competing concerns: a plaintiff's right to due process and fairness, a state's right to be free from explaining the propriety of government activities in a foreign court, and the Executive Branch's interest in not only protecting foreign relations, but also international trade. The amendments justify expanding state status and potential immunity to agencies or instrumentalities only when either the state closely controls the entity or the entity performs sovereign acts.

First, Congress can amend § 1603(b)(2) to focus strictly on a sovereign state or a political subdivision's control over the separate entity. A foreign state's sovereign interest is arguably stronger in a closely controlled entity than in a remote entity. Also, foreign policy issues are arguably more intertwined with a closely controlled entity than with a remote entity. The Executive Branch's interests, therefore, are generally stronger when an entity is closely controlled than when it is not. Consequently, § 1603 would presume only closely controlled entities are sovereign states.

Under a control approach, courts would consider ownership as only one criteria when determining "state status." The court took this


191. In re Air Crash Disaster Near Roselawn, 909 F. Supp. 1083, 1089 (N.D. Ill. 1995), aff'd, 96 F.3d 932 (7th Cir. 1996).
approach in *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*. The *Edlow* court provided the first interpretation of § 1603(b)(2). The court looked beyond strict ownership because the defendant was located in a socialist country which ultimately owned all entities. The court reasoned that a "state's system of ownership, without more" should not be the sole reason to designate an entity a state agency or instrumentality. The court, in not conferring state status, noted that the state did not subsidize, hold board seats, or manage in daily operations. Likewise, the *Gates* court used a similar approach to determine that the state Council's "active supervisory role" over Alberta Pork qualified it as a state agency or instrumentality.

The control approach requires that Congress provide the courts with clear "control" criteria. Fortunately, the courts currently utilize control factors when determining whether an entity is an "organ of a foreign state" under § 1603(b)(2). Courts have focused on the following factors:

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

Courts need such criteria to pursue the goals of uniformity and predictability. Achieving both goals would aid international commerce by supporting the perception of justice and the stability of transactions. The control approach, moreover, offers the benefit of eliminating the obvious non-sovereign cases from the FSIA. Commercial entities whose sole connection to a state is indirect stock ownership would not receive any sovereign protections.

The second proposal, though more complex, would align § 1603 closer to the restrictive theory by implementing a functional approach. Under

193. *Id.* at 832. But see *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978). In *Yessenin-Volpin*, the plaintiff sued Novosti, a Soviet information agency. Even though Novosti was a juridical person financially responsible for its obligations, the court reasoned that a socialist state owns all organizations such as Novosti. *Id.* at 854.
195. See *supra* notes 118-19 and accompanying text.
a functional approach, a tiered agency or instrumentality would receive only the Act’s immunity protection when performing a sovereign act. The Act’s presumption of state status would differ for directly owned entities than for tiered entities. Section 1603 would continue to presume a directly owned entity is a foreign state. The same policies supporting state status for closely controlled entities justify treating directly owned entities as foreign states; the foreign sovereign and the United States’ interests warrant intrusion upon the private party’s interest. Such entities and private party opponents would continue to operate under the FSIA’s current procedural rules. A private party attempting to defeat a claim of immunity would have to establish a prima facia case that one of the Act’s exceptions to immunity applies.197

A tiered entity, however, would no longer be presumed to be a foreign state under § 1603. Removing this presumption presents only a minor risk to affronting a state’s sovereignty because tiered entities do not possess attributes particular to sovereign states. Their remoteness and independence removes the mystification of tiered entities as foreign states above the normal procedures of justice. There is no indication that suits involving tiered entities will endanger foreign policy or international trade interests. Consequently, a private party’s interest in due process justifies shifting to tiered entities the costs of legal disputes that they create.

Under the functional approach, a foreign agency or instrumentality sued in state court continues to remove the action to federal court pursuant to § 1441(d), the FSIA’s removal clause. This enables the federal courts to continue to determine the ultimate immunity issue. In federal court, once a plaintiff, seeking to remand, establishes a prima facia case that the entity is “tiered,” the burden shifts to the defendant entity. Then, a foreign entity seeking the Act’s protections or immunity must prove either direct ownership or a sovereign act.

To determine direct ownership, a court would decide whether an entity’s parent is a political subdivision or an agency or instrumentality.198 An entity would establish direct ownership by proving that the parent is a political subdivision. Then, the parties would continue under the Act’s normal procedural scheme. As noted, direct ownership justifies the continued presumption of state status and the attendant

197. See supra note 62 and accompanying text.
procedural benefits. However, an entity failing to prove direct ownership, a tiered entity, carries the burden of proving its acts were sovereign in nature.

Courts would continue to utilize § 1605(a)(2), the commercial activity exception, when determining whether the activity in question was commercial or sovereign. A tiered entity involved in an action "based upon" a "commercial activity" will not receive immunity. The Supreme Court defined "based upon" as "those elements that, if proven, would entitle a plaintiff to relief under his theory of the case." It requires more than a "mere connection with" the commercial activity. A commercial activity determination is a question of behavior and not motive; a court examines the type of action and not the entity's reasons for the action. The Supreme Court stated that when a sovereign acts "in the manner of a private player" within the market its acts are "commercial within the meaning of the FSIA."

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199. This approach is similar to the approach taken by England's State Immunities Act for separate entities. See supra note 171.
200. 28 U.S.C. § 1605(a)(2) (1994) states that immunity will not be granted when [T]he action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

Id.

202. Id. at 358.
203. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992). The Court reasoned that the private person distinction was the meaning Congress understood the restrictive theory required at the time it passed the statute. Id. at 612-13. Many commentators have criticized the commercial activity exceptions and the Court's interpretation of it. See Joan E. Donoghue, Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception, 17 YALE J. INT'L L. 489, 499-516 (1992) (asserting that interpretations of "commercial activities" has lead to unpredictable results); Amelia L. McCarthy, The Commercial Activity Exception—Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity, 77 MARQ. L. REV. 893 (1994); Jonathan Kaiden, Millen Industries v. Coordination Council For North American Affairs: Unnecessarily Denying American Companies Right to Sue Foreign Governments Under the Foreign Sovereign Immunities Act, 17 BROOK. J. INT'L L. 193 (1991); Garvey, supra note 175, at 463-74 (claiming courts manipulate what constitutes an "act" to conceal political motivations). But see Mark B. Feldman, The United States Foreign Sovereign Immunities Act of 1976: A Founder's View, 35 INT'L & COMP L.Q. 302 (1986) (asserting that complex commercial transactions require a flexible clause and the courts have generally applied it correctly). Writers have proposed various changes to help guide the courts in their determination of the nature of an activity. E.g., McCarthy, supra, at 914-23. Under the functional approach, any changes to the commercial activity exception would be incorporated into the court's analysis when determining whether the activity was sovereign in nature.

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Courts would grant immunity to tiered entities involved in sovereign acts not because of their structure, but because of the public nature of their acts. This approach emphasizes the activity nature of the restrictive theory. If a tiered entity’s activities are not sovereign acts, the federal court would remand the action to state court. The policies justifying the extension of the Act’s procedural benefits to directly-owned entities do not warrant an extension to tiered entities.

In summary, § 1603 would continue to grant state status to directly-owned agencies and instrumentalities, but not to tiered entities. Directly-owned agencies or instrumentalities would continue to receive the Act’s procedural protections and possible immunity; tiered entities, however, would not receive the procedural protections of the Act. Nevertheless, tiered entities conducting sovereign acts could obtain immunity.

**CONCLUSION**

Tiering allows the FSIA’s protections to unnecessarily metastasize to remote entities who neither have sovereign attributes or are involved in sovereign acts. Tiering disputes will only increase as transactional effects pulse across the synapses of interconnected entities. Courts confronting tiering questions should not automatically equate an agency or instrumentality with a foreign state. The *Gates* court’s prohibition against tiering was a proper interpretation of the language of § 1603(b)(2). Furthermore, the ruling supports the policies of sovereign immunity.

Notwithstanding the *Gates* ruling, the Legislature should follow the lead of many other countries and amend § 1603. A control or functional approach would place sovereign immunity questions in line with international practice. Such an amendment would bring the FSIA closer to the restrictive theory as laid out in the Tate letter. Furthermore, the proposed amendments distribute the burdens and benefits in a manner that reflects the strength of the interests involved.

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